DOCUMENT RESUME

ED 044 799 EA 003 152

AUTHOR	Bensfield, James A., Comp.; Peck, Carolyn, Comp.
TITLE	Student Rights Litigation Materials.
INSTITUTION	Harvard Univ., Cambridge, Mass. Center for Law and Education.
PUB DATE	May 70
NOTE	337p.
EDRS PRICE	EDRS Price MF-$1.25 HC-$16.95
DESCRIPTORS	*Civil Rights, *Court Litigation, *Discipline Policy, Freedom of Speech, Police School Relationship, *School Law, *Student Problems, Student School Relationship

ABSTRACT

This report presents complaints and supporting legal memoranda from recent student rights cases. The complaints cover recurrent constitutional arguments that are advanced in most cases. The supporting documents offer a complete compendium of applicable current decisions. The conception of student rights reflected herein is traditional, encompassing questions involving freedom of expression, personal rights, and procedural fairness. The typical planitiff is a high school or junior high school student who has been suspended, expelled, transferred, or otherwise disciplined. Although most of the cases focus on the legal right of school officials to act as they did, others emphasize the fairness of the procedures by which the disciplinary action was handled; both issues often appear in the same case. (Pages 83-85 and 97-105 may be of poor quality when reproduced because of marginal legibility.) (Author/JF)

ED044799

EA 003 152

STUDENT RIGHTS LITIGATION MATERIALS

Prepared by
The Harvard Center for Law and Education

May 1970

Appendix, September 1970

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY.

ED0 44799

HARVARD UNIVERSITY

CENTER FOR LAW AND EDUCATION

Mailing Address:

38 Kirkland Street
Cambridge, Massachusetts 02138
617-495-4666

This package of materials is designed to be of help to Legal Service Attorneys who are, or who are about to be, active in the area of student rights in the secondary schools. Many offices are already involved in such litigation, but more Legal Service Attorneys can and should lend their aid in the conflict now going on in high schools and junior high schools between students, who have only recently been recognized as "persons" under the Constitution, and school officials, many of whom still cling to autocratic notions of their own power.

The enclosed materials consist mainly of complaints and supporting legal memoranda from recent student rights cases. The difficulty of developing truly "model" court papers in this area stems from the fact that the litigative approach best suited to a particular case is often a function of a whole range of factors which differ from place to place, such as state education laws, local school board regulations, the practices of individual school administrators, judicial precedent within a given juristiction, etc. There are, of course, recurrent constituional arguments which can be made in most of the cases and the supporting documents offer a rather complete compendium of applicable current decisions. Needless to say, this is an area of the law which is developing rapidly and close watch should be kept on sources of new judicial support.

The conception of student rights which the materials reflect is a traditional one, encompassing primarily questions involving freedom of expression, personal rights, and procedural fairness. The typical plaintiff in the cases is a high school or junior high school student who has been suspended, expelled, transferred, or otherwise disciplined because of something he said, or did, or wrote, or because of the way he dressed or wore his hair. While most of the cases focus on the question of whether or not school officials had the legal right to act as they did, some others are directed more toward the fairness of the procedures by which the disciplinary action was handled. Often, both issues appear in the same case.

While it can be argued that such a civil libertarian approach to the problems of the schools somehow misses the mark, and that reinstating a suspended student to a school he may well be better off staying out of sidesteps the real task of making the schools themselves better places, we submit that there are sound reasons for lawyers becoming involved in these kinds of issues.

First of all, and most obviously, the individual student who has been disciplined for exercising a constitutionally protected right has been significantly injured. Suspensions, expulsions, detentions, and other disciplinary action based on non-disruptive speech, behavior, or appearance represent the kind of harm inflicted by schools which no amount of increased money or resources can remedy. The atmosphere which results in such actions is precisely what is wrong with many schools. The long hair cases, for instance, may seem trvial, but a student denied his right to an education because of the way he looks reflects tellingly on the educational assumptions under which many school officials are presently operating. Since the whole notion of public school students having constitutional rights is relatively recent, many students and parents may not know where to get legal help.

Second, this kind of litigation often has an impact on the schools beyond the individual student who has been treated unjustifiably. A particular plaintiff is more often than not attacking rules or informal practices which affect students throughout the school or throughout the school system. Class actions can be brought. It may often be the case that the mere threat of litigation will spur reform of unfair or abusive school practices. When a lawsuit has been initiated, school authorities may act to moot the case before a decision is even handed down, as in Owens v. Devlin (enclosed), where the Boston School Committee agreed to amend its Rules and Regulations regarding the procedures followed in suspension cases.

Third, the exposure, through litigation or otherwise, of the means by which schools deny students their fundamental rights can often serve as an entering wedge for an attorney to get at other features of the schools -- discrimination in testing,tracking, allocation of resources -- which may serve as the focus of separate lawsuits or concerted community action. Interrogatories used in connection with a straightforward student rights case may, for example, unearth information necessary to substantiate other arguably illegal practices. In short, ferreting out the blatant cases of unfair treatment can be a good way to open up inquiries into a myriad of other means by which schools deny students their educational entitlement.

Litigation, obviously, is not the only way for an attorney to become involved in questions of student rights. Many cases, as mentioned, can be settled without ever going to court, especially where favorable judicial precedent or regulations exist; guidelines for suspension hearings and disciplinary codes can be drafted and lobbied for; student, parent, and community groups seeking change in the schools can be given assistance. A coalition of high school students in New York City, for instance, has recently proposed a bill of rights and is bringing pressure on the school board to get it adopted. In effect, they are negotiating collectively for a contract with the school sytem much like the one their teachers annually struggle for. In Washington D.C., a congress of high school students has also proposed a bill of rights, including the right to strike, to form political organizations, to print underground newspapers, to choose their own grading system, and to have a say in the removal of teachers.

These materials do not by any means exhaust the kinds of suits which can be brought in the student rights area. They were chosen because of their representativeness. Variations on the particular fact patterns will certainly abound. It may not be necessary or desirable, for instance, to wait until a student has been suspended or expelled from school to initiate judicial action. There are numerous ways, short of suspension, that school officials can inhibit constitutionally protected behavior -- notations on transcripts, poor college or job recommendations, denial of access to extra-curricular activities, etc.

The Center will welcome any court papers which have been drawn up or filed in student rights actions and which would be of use to other Legal Service Projects. We will act as a clearinghouse for these materials and thereby, hopefully, avoid a lot of duplication and wasted effort.

The resources of the Center are also available to provide assistance on individual cases. If you believe that there are grounds for legal action centering around a student rights issue not covered in these materials, please contact us.

SUMMARY OF THE MATERIALS

I. FREEDOM OF EXPRESSION: Scoville v. Board of Education of Joliet Township High School District 204, 286 F.Supp. 988 (N.D. Ill., 1968) aff'd 2-1, 415 F. 2d 860 (7th Cir., 1969), rev'd en banc on rehearing April 1, 1970: Complaint, Brief on Appeal, Supplementary Brief, Appeals Court Opinion on Rehearing.

The Scoville case involved high school students who were expelled for distributing on school premises a publication which contained, in the words of a letter sent to the offenders' parents, "inappropriate statements about school staff members." The District Court upheld the action of the school officials in an opinion which was originally affirmed by the 7th Circuit Court of Appeals. The case was reheard by that court, and, on April 1, 1970, reversed.

The Scoville case represents an important new weapon in the legal arsenal available to the high school student rights advocate, even given its most narrow construction. The opinion adopted plaintiffs argument and applied the judicial standard announced by the Supreme Court in Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) to a situation in which students were actively protesting school policies as well as the practices of certain named school administrators. (The District Court opinion in Scoville was written before the Tinker case was announced, as was the enclosed brief, although a supplemental memorandum citing Tinker is included.) Tinker, which dealt with students passively demonstrating against the Viet Nam war by wearing black arm bands, held that only when there existed "facts which might reasonably have led authorities to forecast substantial disruption of or material interference with school activities" could the First Amendment rights of high school students be restricted.

As Judge Kiley points out in Scoville, the Tinker standard is an extension of a similar rationale put forth in an earlier circuit court case, Burnside v. Byers, 363 F. 2d 244 (5th Cir., 1966). The Burnside case existed at the time of the district court ruling in Scoville, but the test put forth therein was not followed. The approach taken by the first Scoville court is important to note, however, because it represents a position commonly taken by school officials and courts in these kinds of cases. That approach assumed that there was a certain class of student expression which *per se* justified school authorities in taking disciplinary action -- e.g., speech on school grounds which amounts to an immediate advocacy of, and incitement to, disregard of school administrative procedures" -- and that in such cases it was unnecessary for school officials or the courts to make a factual inquiry into the question of whether or not it was reasonable to assume that the activity would result in material disruption. This approach is wrong. A student's First Amendment right to freely express controversial viewpoints can be restricted only if substantial disruption in fact occurs or can be reasonably forecasted. The Tinker test is rendered meaningless if some kinds of speech or writing or behavior can be prohibited absent a judgment by school officials as to its impact on the rest of the school.

To the extent that the Tinker test protects student expression in the absence of material disruptions in school activities, a significant area of protected student expression has been carved out. Although Justice Fortas was careful to point out that Tinker was not concerned with "aggressive, disruptive or even group demonstrations," the opinion taken as a whole lends strong support to the position that neither the substance nor the means of student expression can, standing alone, constitute grounds for disciplinary action. Scoville has made it clear that high school students have the right to speak out on controversial issues, to criticize school policies and personnel, to distribute literature on school premises, to publish newspapers free from official censorship -- all subject, of course, to the interest of the school in maintaining order and to rules and regulations reasonably calculated to maintain order. Aside from Scoville, there are at the present time very few decisions which extend the doctrine of Tinker beyond the particular factual situation which was presented in that case, but it is precisely these kinds of cases which will be arising with continued frequency in the secondary schools.

Given the fact that speaking out on sensitive issues or advocating change in school policies does, almost by definition, result in some "disruption, the Tinker test may turn out to be less of a breakthrough than it appears. It is, however, a beginning. Where previously high school students had virtually no legal alternatives when faced with the all-inclusive authority of the school system, they now have some breathing room.[1] The traditional *in loco parentis* view of the schools seems to be slowly giving way, in the courts at least, to a view of education premised on the fact that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (Tinker). The traditional reluctance of the courts to interfere with the judgment of professional educators in matters of public school policy is now being eroded. No longer can courts uphold restraints on student expression merely because such restraints bear some reasonable relation to "educational goals." The interest which must be balanced against free expression, by judges and schoolmen, is neither the inculcation of a particular moral or political viewpoint, nor the fostering of respect for authority in general, but, rather, the material disruption of school activities. The arguments should no longer be over the question of whether the courts have any business meddling in the educational realm, but rather over definitions of "material disruption" and "school activities."

---

[1] In Sullivan v. Houston Independent School District, Civil Action 69-H-266 (S.D. Texas, Houston Div., Dec. 30, 1969), a case involving students who prodeuced and distributed off school premises a newspaper critical of school policies, the court did go beyond Tinker when it said that "if a student complies with reasonable rules as to times and places of distribution within the school, and does so in an orderly, non-disruptive manner, then he should not suffer if other students, who are lacking in self control, tend to over-reactthereby becoming a disruptive influence."

Two final points about Scoville should be noted. First, even though the plaintiff students were eventually reinstated, the case did not become moot. Relief was also requested in the form of a declaratory judgment and an injunction prohibiting school officials from making information of the expulsions available to colleges and prospective employers and from noting the expulsion on school records.

Second, the Illinois statute which gives school boards the power "to expel students guilty of gross disobedience and misconduct" was challenged on the grounds of vagueness and overbreadth, although the court did not rule on these issues. Most school authorities have grants of power cast in similar language, and in all these cases the vagueness and overbreadth arguments should be made. An important decision on this point, Soglin v. Kaufman, 295 F. Supp. 978 (W.D. Wis. 1968), aff'd (7th Cir., 10-24-69), held that a regulation prohibiting students' "misconduct" was unconstitutionally vague. Other decisions, notably Esteban v. Central Missouri State College, 514 F. 2d 1077 (8th Cir., 1969), have come down with contrary rulings, however. For a good discussion of the overbreadth question, see Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844.

II. PERSONAL RIGHTS (HAIR AND DRESS REGULATIONS)

A. ACLU Model Complaint and Memorandum on Class Actions

B. Jeffers v. Yuba City Unified School District, Civil No. S-1555 (E.D. Calif., filed April 23, 1970): Supplemental Memorandum of Points and Authorities

C. Montalvo v. Madera Unified School District Board of Education, Civil No. 16586 (Calif. Sup. Ct.): Excerpt from amicus brief filed by American Civil Liberties Union

D. Richards v. Thurston, (1st Cir., April 28, 1970): Appellees Brief on Appeal, Opinion

School authorities cannot arbitrarily regulate the dress or hair style of their students. The Supreme Court has never spoken out on the issue, but the language of Tinker, as well as several favorable lower court opinions, lends support to any challenge to these kind of regulations.

As the court said in Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala., 1969): "Although there is disagreement over the proper analytical framework, there can be little doubt that the Constitution protects the freedom to determine one's own hair style and otherwise to govern one' personal appearance.

The opinion in Richards seems to be typical of the approach taken in most of the decisions which strike down hair regulations. Like the other favorable appeals court decision on this issue (Breen v. Kahl), Richards held that restrictions on hair style violated the Due Process clause of the Fourteenth Amendment. "We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." Given such a right, the court held that the defendant principal had failed to present a sufficient countervailing justification for the rule. While Judge Coffin did not elaborate on what factors would justify such restrictions, it should be argued in these cases that only considerations of health or safety are constitutionally valid reasons for regulating hair styles.

Other suits have argued that hair restrictions violate First Amendment rights of free expression, the right to privacy derived from the Ninth Amendment, as well as constitutional safeguards against overbreadth and vagueness. While the courts seem to find it least painful to follow the Due Process reasoning of the Richards decision, these other arguments should also be made. An extensive First Amendment attack on a hair regulation was made in Montalvo v. Madera Unified School District Board of Education (Calif. Sup. Ct.). An excerpt from the brief in that case is included.

The ACLU model complaint for class actions challenging hair regulations is designed to avoid the problem of recalcitrant school officials who feel themselves unbound by decisions to which they or their students were not joined as parties. The memorandum following the complaint sets out the factors to be weighed in deciding when and when not to proceed via a class action and is applicable to the whole range of students rights litigation. (See also the Jones procedural due process case in the next section.)

The Jeffers supplemental memorandum is organized on a case by case basis, and summarizes most of the recent rulings.

The materials in the package deal exclusively with longhair restrictions, but the same legal arguments are applicable to dress codes. Restrictions on dress should be subject to the same burden of justification as restirctions on other constitutionally protected rights, to wit, they must be designed to prevent substantial disruption in school activities. The New York State Commissioner of Education, for example, has ruled that school authorities can only "prohibit the wearing of any kind of clothing which causes a disturbance in the classroom, endangers the student wearing the same, or other students, or is so distractive as to interfere with the learning and teaching process." Dalrymple v. Board of Education of the City of Saratoga Springs (No. 7594).

III. PROCEDURAL DUE PROCESS:

A. Jones v. Gillespie, (Cf. of Comm. Pl., Phila; 22 April 1970): Complaint, Interrogatories, Brief, Court Order.

B. Owens v. Devlin, Civil No. 69-118-G (D.C. Mass.): Interrogatories, Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction, Amended Rules and Regulations ("Code of Discipline")

C. Andino v. Donovan, Civil No. 68-5029 (S.D.N.Y., filed January 1969). Excerpt from Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction arguing for a fundamental right to a free public education.

Many recent cases have challenged the practice of school authorities by which students are suspended, expelled, or transferred without being afforded a fair hearing and other procedural safeguards.

The scenarios in the cases are familiar: A student is told that he has been suspended (expelled, transferred) from school, often with no prior warning or indication of the charges against him. His parents may be invited to attend a "conference" with the principal or some other administrative official to be told the reason for the disciplinary action, after which the student may or may not be reinstated. The affairs are often hopelessly one-sided, neither the student nor his parents being given the opportunity or the means to challenge the accusations made by the school authorities.

The Jones case represents a straightforward judicial attack on a typical suspension arrangement. The plaintiff, representing the class of all students in the Philadelphia Public Schools, challenged a procedure by which students were suspended from school, often for long periods of time, without being afforded a fair hearing. The case resulted in a consent decree under which the class defendant were enjoined from suspending any student for a period longer than five days absent a proper hearing. The School District was also ordered to establish regulations re. the elements of the hearing itself -- notice of charges, notice of time and place of hearing, right to counsel, right to appeal, etc.

The Owens litigation, while basically a procedural due process suit, involved several additional issues. Plaintiffs, first of all, were technically being transferred from thier junior high school. Secondly, there was an element of racial discrimination involved. Thirdly, the defendant principal failed to follow even the existing suspension procedures, inadequate as they were. The case was settled by stipulation, the Boston School Committee agreeing to amend its Rules and Regulations re. suspension and transfers. (The amended Rules are included.)

As a general proposition, when state education laws or local school board regulations do provide for some procedural safeguards in suspension and transfer cases, it may often be possible to argue that those safeguards are not followed. The New York State Legislature, for example, has recently passed a law guaranteeing the right to notice, to a hearing, to counsel, and to cross examination in suspension cases lasting more than five days, and the New York City School Board has established procedures governing the short-term "principal suspension." It is often the case, however, that both sets of provisions are violated by individual principals.

The short exerpt from the Andino memorandum is included because the argument contained therin should serve as the starting point for any constitutional attack on arbitrary suspension and transfer procedures, i.e. that the right to a public education is fundamental and, therefore, cannot be taken away without due process of law. (Jones and Owens rightly begin with this position.) Such a right can be inferred from state education laws (e.g., compulsory attendance provisions), the constitution, and the language of various Supreme Court decisions.

Having established the right to an education, judicial precedent does not clearly set out specific standards of procedural fairness which must accompany the deprivation of such a right. There have been no U.S. Supreme Court or Court of Appeals decisions involving due process in the secondary schools, but the standards announced in the few college cases (Dixon, Stricklin, etc.) are applicable, and extensively discussed in the materials.

The real controversies in this area involve not so much what elements of a fair procedure should be constitutionally required (see the new Boston Rules for a reasonable hearing procedure), but rather the point in time when they should attach. Most existing procedures, including those spawned by the Boston and Philadelphia lawsuits, recognize the distinction between "short term" and "long term" suspensions and provide for the full panoply of due process safeguards only in the latter. The rationale for the distinction stems from the view that high school principals should have available a disciplinary tool which can be employed on the spot without the necessity of notice or hearing. Such short term suspensions are typically limited to five days. Since it is only rarely the case in which the maintenance of order in school depends on the immediate removal of a student, since short term suspensions account for a great majority of high school disciplinary actions, and since the procedure is often abused by adding one short term suspension on top of another, there is a strong argument that all the procedural safeguards should apply before any student is denied access to school for any length of time, with exceptions for emergency situations only.

Except in the cases of compounded short-term suspensions, students are rarely expelled completely from a school system. As was the case in Boston, the disciplinary transfer -- to simply another school or to a special school -- is commonplace. The distinction between an expulsion and a transfer should not be used to justify an arrangement providing for a fair hearing in one case and not in the other (as in the Madera case in New York, since rendered obsolete by a state statute). Hearings must be provided whenever a student is denied, for disciplinary reasons, access to a school he otherwise has a right to attend.

As mentioned, lawyers can often take a hand in drafting disciplinary procedures for local school authorities. The Oakland Lawyers' Committee Project, for example, has recently recommended extensive revisions to the

Oakland School Board's disciplinary code, including a provision for establishing school-site disciplinary committees with student and parent representation. The proposal also contains provisions dealing with the role of police in the schools, corporal punishment, drugs, as well as detailed procedures for suspensions and expulsions. The Youth Law Center has done much the same thing in San Francisco, recommending that on-site mediation committees be established in all schools to deal with a whole range of disciplinary problems. Both proposals work within the framework of existing California statutes dealing with suspension procedures. (Copies of either proposal are available from the Center.)

IV. MARRIAGE AND PREGNANCY

A. *Johnson v. Board of Education of the Borough of Paulsboro*, Civil Action No. 172-70 (D.C.N.J., April 14, 1970): Plaintiff's Brief, Court Order.

B. *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (1969): Plaintiff's Trial Memorandum

C. N.Y. School Board Memorandum on the Education of Pregnant Students

Plaintiffs in the Johnson case were challenging a formal school board policy under which "any married student or parent shall be refused participation in extra-curricular activities." Plaintiffs' attorneys argued that the policy violated the First Amendment rights of freedom of expression and association, the Equal Protection and Due Process clauses of the Fourteenth Amendment and the penumbral right of privacy which has been inferred from the Ninth Amendment.

There was no written opinion in *Johnson*, but counsel for plaintiffs' analysis indicates that the trial judge stated that he was striking down the school board policy on Equal Protection grounds. He held that the rule bore no reasonable relationship to legitimate school purposes. As the analysis points out, however, the judge rejected only the particular moral justifications for the rule which the school board cited in its argument, thereby implying that there could exist *some* moral justification for such a rule. Such a view is contrary to the thrust of recent cases, notably *Tinker*. As has been emphasized, the extent of constitutional rights guaranteed to students is no longer solely a function of school officials' ability to find any reasonable justification for their policies. Disruption in the educational process must occur when a deprivation of an educational right occurs. The desire to prevent moral contamination is not, itself, enough.

Even when educational reasons are put forth to justify school policy, such as the contention in *Johnson* that restrictions on married students' extra-curricular activities were necessary to maintain a high academic standing, there must be a reasonable relation between the educational goal and the policy itself. The *Johnson* rule assumed a direct correlation between marriage and academic performance and could well have been struck down for overbreadth on those grounds. Further, the rule assumed that grade-measured academic performance was educationally more valuable than extra-curricular activities. The brief presents good counter-arguments to this position.

The school board in Johnson assumed that while there may exist a right to attend school, participation in extra-curricular activities was a privilege -- a privilege whose denial could be accomplished without regard for constitutional considerations. The brief dispels the distinction. The argument presented on this point is applicable to a whole range of students rights cases in which students are not denied an education entirely, but only some part of the total educational experience. Male students being barred from participation in athletics because of behavior or appearance is commonplace. As the brief points out, "the distinction completely disregards the fact that, like scholastic activities, extra-classroom activities are funded by the state by means of its taxing power as a significant aspect of the educational process."

The Perry case challenged a school policy which automatically barred pregnant girls and unwed mothers from school. The court ruled narrowly that the exclusion of unwed mothers without a hearing violated Due Process. The opinion, however, made it "manifestly clear that lack of moral character is certainly a reason for excluding a child from public education." The court went on to concede that"the fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for rehabilitation or the opportunity for future education."

Even though the plaintiff in Perry may have eventually been reinstated, the approach taken by the court is too narrow. The possibility of an unwed mother "morally contaminating" her fellow students cannot, absent a verifiable disruption in school activities, serve as a justification for an expulsion from school. The brief also convincingly argues that the failure to exclude unwed fathers violates the Equal Protection clause.

The court had no problems with the policy of excluding pregnant girls. "The purpose for excluding such girls," it said, "is practical and apparent." In light of recent student rights decisions in other areas, however, such procedures may not appear as practical and apparent as they once did. They may well be unconstitutional.

School authorities not only have a legal obligation not to discriminate against pregnant girls by denying their right to attend regular classes, they may also be obligated to provide special services to such students once it becomes unadvisable, for reasons of health, for them to attend ordinary sessions. Many juristictions have set up such programs. The New York City School Board memorandum reflects a policy which is a far cry from the automatic exclusion procedure (ala the Perry case) which existed in that city only a few years ago.

V. THE POLICE AND THE SCHOOLS

A. *Overton v. New York*, 24 N.Y. 2d 522, 249 N.E. 2d 366, 301 N.Y.S. 2d 479 (1969), adhered to, F. Supp. , 69 Civ. 40006 (S.D.N.Y., April 7, 1970) (Appeal pending): Memorandum of Law in Support of Petition for Habeas Corpus.

B. "What Constitutes Your Right to Privacy on Campus," by Roy Lucas.

C. *Howard v. Clark*, Civil No. 2740/69, (N.Y. Sup. Ct., March 25, 1969): Complaint, N.Y. Supreme Court Decision.

The *Overton* case involves the issue of the extent of Fourth Amendment search and seizure protections in the high schools. At each step in its rather prolonged history (see habeas petition), the authority of the Vice Principal of Mount Vernon High School to consent to the search by police of student lockers has been upheld. (The officers possessed a warrant which was later held to be invalid.)

The New York State Courts which originally ruled in *Overton* seemed to be clinging to a notion that, until recently, has pervaded judicial rulings in the high school student rights cases: Since school officials are acting *in loco parentis*, they have the authority to waive constitutional safeguards which have been held applicable to real people in the real world. The New York Court of Appeals appears to have retained this notion even after the case was remanded by the U.S. Supreme Court for consideration in light of a case (*Bumper*) which held that a valid consent to search cannot be given when the consenter has been presented with a presumably valid search warrant.

The Roy Lucas memo on "What Constitutes Your Right to Privacy on Campus" offers extensive case support for high school search cases.

The plaintiffs in the *Howard* case were suspended from school after being arrested off school grounds and charged with possession of narcotics. The action was taken under a local school board regulation providing for automatic suspension in such cases.

The court did not rule on any of the Equal Protection or Due Process issues raised, nor did it question the constitutionality of the New York State Statute setting out the grounds for suspension. Instead, it held simply that the New Rochelle School Board had exceeded its authority under the state statute.

No brief was filed in *Howard*, but the constitutional arguments are outlined in the complaint.

VI. "Problems of Student Discipline and Classroom Control" by Roy Lucas. This outline of source material on student rights questions was prepared for the spring conference of the National Association of Teacher Attorneys, held on May 5, 1970.

James A. Bensfield
May 1970

APPENDIX

I. FREEDOM OF EXPRESSION

A. Memorandum of Decision in Eisner v. Stamford Board of Education, Civil No. 13220 (D.C. Conn.) 1970.

Eisner holds that a board of education rule requiring that printed matter be approved by the school administration before distribution is an unconstitutional prior restraint on free expression. The court stresses the importance of keeping peaceful avenues of expression open.

II. CORPORAL PUNISHMENT

A. Complaint in Murphy v. Kerrigan, Civil Action No. 69-1174-W (D.C. Mass.), settled by stipulation, June 3, 1970.

B. Memorandum of Law in Hernandez v. Nichols, Civil No. C-70-800-RFD (N.D. Cal.)

C. Draft of Cruel and Unusual Punishment Argument in Corporal Punishment Case, by Carolyn Peck.

Murphy v. Kerrigan challenged corporal punishment in the schools broadly as a policy which contravenes Constitutional rights protected by the Eighth and Fourteenth Amendments, and whose standards and procedures violated Constitutional principles. Included in these papers is a model procedure for dealing with grievances against teachers. The case ended with a permanent injunction against corporal punishment in the Boston schools.

The Memorandum in Hernandez v. Nichols challenges corporal punishment on procedural due process grounds.

The draft of the Cruel and Unusual Punishment argument explores the history of corporal punishment in an educational setting. It is suited for use in conjunction with Fourteenth Amendment arguments on equal protection and due process.

Carolyn Peck

September 1970

TABLE OF CONTENTS

PAGE

INTRODUCTION..i

I. FREEDOM OF EXPRESSION

A. Scoville v. Board of Education of Joliet Township High School District 204, 286 F. Supp. 988 (N.D. Ill., 1968) aff'd 2-1, 415 F. 2d 860 (7th Cir., 1969), rev'd en banc on rehearing April 1, 1970

1. Complaint..1

2. Appellant's Brief..9

3. Supplementary Brief..28

4. Decision..32

II. "PERSONAL RIGHTS" (HAIR AND DRESS)

A. A.C.L.U. Materials

1. Memorandum on Class Actions..45

2. Model Complaint..55

3. List of Current Hair Decisions..64

B. Jeffers v. Yuba City Unified School District, Civil No. S-1555 (E.D., California, filed April 23, 1970): Supplemental Memorandum of Points and Authorities..65

C. Montalvo v. Madera Unified School District Board of Education, Civil No. 16586 (Calif. Sup. Ct.): Excerpt from amicus brief filed by American Civil Liberties Union Setting out First Amendment Argument..86

D. Richards v. Thurston, (1st Cir. Ct. of Appeals, April 28, 1970)

1. Brief for Appellee..96

2. Opinion..106

III. PROCEDURAL DUE PROCESS

A. Jones v. Gillespie, (Ct. of Common Pleas, Phila., Order of April 22, 1970.)

1. Complaint..111

2. Interrogatories..115

3. Brief..120

4. Court Order..129

B. Owens v. Devlin, Civil No. 69-118-G (D.C. Mass., Feb. 28, 1969)

1. Points and Authorities in Support of Plaintiff's Motion for a Preliminary Injunction.......................... 131

2. Excerpt from Amended Code of Discipline, the Boston Public Schools...167

C. Andino v. Donovan, Civil No. 68-5029 (S.D.N.Y., filed January 1969): Excerpt from Memorandum of Law.................. 171

IV. MARRIAGE AND PREGNANCY

A. Johnson v. Board of Education of the Borough of Paulsboro, Civil Action No. 172-70 (D.C., N.J., April 14, 1970

1. Excerpt from Plaintiff's Brief in Support of Motion for Judgment on the Pleadings...............................177

2. Order Granting Plaintiff's Motion for Summary Judgment...201

B. Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (1969): Plaintiffs' Trial Memorandum........... 203

C. New York School Board Memorandum on the Education of Pregnant Students...218

V. THE POLICE AND THE SCHOOLS

A. Overton v. New York, 24 N.Y. 2d 522, 249 N.E. 2d 366, 301 N.Y.S. 2d 479 (1969), Adhered to, F. Supp. , 69 Civ. 40006 (S.D.N.Y. April 7, 1970) (Appeal Pending): Memorandum of Law in Support of Petition for Habeas Corpus...221

B. "What Constitutes Your Right to Privacy on Campus" by Roy Lucas..248

C. Howard v. Clark, Civil No. 2740/69, (N.Y. Sup. Ct., March 25, 1969)

1. Complaint.. 257

2. N.Y. Supreme Court Decision.................................. 264

VI. "PROBLEMS OF STUDENT DISCIPLINE AND CLASSROOM CONTROL", by Roy Lucas (Outline of cases and other supporting materials)......... 268

APPENDIX

I. FREEDOM OF EXPRESSION

A. Eisner v. Stamford Board of Education, Civil No. 13200 (D,C. Conn.) 1970 281

II. CORPORAL PUNISHMENT

A. Murphy v. Kerrigan, Civil Action No. 69-1174-W (D.C. Mass.) 1970 289

B. Hernandez v. Nichols, Civil No. C-70-800-RFD (N.D. Cal.).. 307

C. Draft of Cruel and Unusual Punishment Argument in Corporal Punishment Case............. 321

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,

Plaintiffs

v

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants

CIVIL ACTION
FILE NO.

EQUITABLE and
DECLARATORY RELIEF
and DAMAGES SOUGHT

COMPLAINT

1. This action is for interlocutory and permanent relief for delcaratory judgment and for damages. This court has jurisdiction by authority of Titles 42 U.S.C., Sec. 1983, 28 U.S.C., Sec. 1343, 28 U.S.C., Sec. 2201 and 28 U.S.C., Sec. 2202.

2. Plaintiff RAYMOND SCOVILLE is a minor, 17 years of age, a citizen of the United States and the State of Illinois, and resides with his parents at 925 Oakland Avenue, Joliet, Illinois. (RAYMOND SCOVILLE is hereinafter sometimes referred to as "minor plaintiff".) Plaintiff MERRILL SCOVILLE is the father and next friend of minor plaintiff RAYMOND SCOVILLE, and is also a citizen of the

United States and the State of Illinois and resides at 925 Oakland Avenue, Joliet, Illinois.

3. Plaintiff ARTHUR BREEN is a minor, 17 years of age, a citizen of the United States and the State of Illinois, and resides with his parents at 655 Ross, Joliet, Illinois. (ARTHUR BREEN is hereinafter sometimes referred to as "minor plaintiff".) Plaintiff JERRY BREEN is the father and next friend of minor plaintiff ARTHUR BREEN, and is also a citizen of the United States and the State of Illinois and resides at 655 Ross, Joliet, Illinois.

4. Defendant, BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS (hereinafter called "JOLIET SCHOOL BOARD"), a a body corporate and politic created by Ill. Rev. Stats., Ch. 122, Sec. 10-1 et seq. and at all times referred to herein, so endowed by said Statute with the right to sue and be sued; and also so empowered to administer public education in the City of Joliet, Illinois, and in particular at a high school known as JOLIET TOWNSHIP HIGH SCHOOLS-CENTRAL CAMPUS (hereinafter called "JOLIET CENTRAL".) At all times referred to herein, defendant ARTHUR L. BRUNING was the Superintendant of the three high schools, including JOLIET CENTRAL, which were administered by the JOLIET SCHOOL BOARD; defendant DAVID R. ROSS was the principal of JOLIET CENTRAL; defendant HOWARD JOHNSON was the junior dean of JOLIET CENTRAL, and defendant CLAYTON WINTERSTEEN was the senior dean of JOLIET CENTRAL.

5. Prior to February 23, 1968, minor plaintiffs were enrolled in the regular day school session at JOLIET CENTRAL, were above average students, were members in good standing of the junior class,

were active in extra curricular activities, and were entitled to attend said high school pursuant to the laws of the State of Illinois, for the purpose of obtaining a free public education.

6. Prior to January 31, 1969, minor plaintiff RAYMOND SCOVILLE was the literary editor of the high school newspaper published by JOLIET CENTRAL.

7. Prior to January 20, 1968, minor plaintiffs were both members of the debating team at JOLIET CENTRAL.

8. The rights and powers to discipline students such as minor plaintiffs are set forth in the Illinois School Code, Ill. Rev. Stats, Ch. 122, Sec. 10-22.6 (1967) which provides that a school board such as JOLIET SCHOOL BOARD, shall have the power:

> "(a) to expel students guilty of gross disobedience or misconduct. . ." (emphasis supplied)

9. Prior to January 15, 1968, minor plaintiffs conceived and published a literary journal known as "Grass High" for the purpose of providing a means by which creative writing talents among students at JOLIET CENTRAL could be displayed and appreciated by students and faculty at JOLIET CENTRAL.

10. On January 15, 1968, minor plaintiffs distributed 60 copies of the first edition of "Grass High" at a price of 15 cents per copy. A true and correct copy of said first edition is attached hereto and incorporated herein as Exhibit I. Said distribution was made to faculty and students at JOLIET CENTRAL. Where said distribution was made in class rooms at JOLIET CENTRAL it was done with the express or implied consent of the teachers in whose rooms said publication was distributed. At no time did said distribution create a disturbance which did, or could have caused, any commotion or disruption of classes at JOLIET

CENTRAL. On January 15, 1968, and at no time prior thereto, were minor plaintiffs asked to desist from such distribution by any member of the faculty or administration at JOLIET CENTRAL; or by any of the defendants.

11. On January 18, 1968, during the second day of final examinations for the Fall semester, 1967/1968, minor plaintiffs were instructed not to report for their scheduled examination but rather to defendant, CLAYTON WINTERSTEEN, senior dean. Minor plaintiffs did report to said defendant, CLAYTON WINTERSTEEN, and were then and there threatened by defendant, CLAYTON WINTERSTEEN, with retribution for their publication of the journal "Grass High."

12. On January 20, 1968, minor plaintiffs were informed by PAUL HAYWOOD, a teacher at JOLIET CENTRAL, that they would no longer be permitted to participate in any debate team activity because of their publication of "Grass High."

13. On January 22, 1968, minor plaintiffs were suspended from classes for the first five (5) days of the Spring 1968 semester at JOLIET CENTRAL.

14. On or about January 31, 1968, defendant DAVID R. ROSS sent to plaintiff MERRILL SCOVILLE and JERRY BREEN and to defendants ARTHUR L. BRUNING and HOWARD JOHNSON, a memorandum purporting to set forth certain "charges" against the minor plaintiffs resulting from their distribution of the journal, "Grass High"; said memorandum recommended that minor plaintiffs be expelled from JOLIET CENTRAL for the remainder of the school term ending June, 1968.

15. Subsequent to January 31, 1968, defendants DAVID R. ROSS, HOWARD JOHNSON and ARTHUR L. BRUNING did recommend to defendants

JOLIET SCHOOL BOARD that minor plaintiffs be expelled from JOLIET CENTRAL for the remainder of the term ending June, 1968.

16. On January 31, 1968, minor plaintiff RAYMOND SCOVILLE was notified by defendants that he was no longer to be considered an editor of the high school newspaper.

17. On or about February 6, 1968, plaintiff MERRILL SCOVILLE and plaintiff JERRY BREEN received a letter from defendant ARTHUR L. BRUNING stating that he would recommend the expulsion of the minor plaintiffs from JOLIET CENTRAL at the meeting of the defendants JOLIET SCHOOL BOARD on February 13, 1968; a true and correct copy of the text of said letter is attached hereto and incorporated herein as Exhibit 2.

18. On February 23, 1968, at a meeting of said defendant JOLIET SCHOOL BOARD, defendant JOLIET SCHOOL BOARD expelled the minor plaintiffs for the remainder of the school term ending June, 1968. Said order of expulsion was contained in a Resolution, a true and correct copy of which is attached hereto and incorporated herein as Exhibit 3.

19. Neither minor plaintiffs nor plaintiff MERRILL SCOVILLE nor plaintiff JERRY BREEN nor any of their representatives attended said meeting. Rather than attend said meeting, plaintiff MERRILL SCOVILLE and plaintiff JERRY BREEN sent a letter to each member of defendant, JOLIET SCHOOL BOARD, which set forth plaintiffs' position. A true and correct copy of the text of the letter sent by plaintiff, MERRILL SCOVILLE is attached hereto, and incorporated herein as Exhibit 4.

20. As a result of said expulsion, minor plaintiffs were forced to complete their studies at the night school session of JOLIET CENTRAL except for the one course which minor plaintiffs were allowed to continue during the regular day session of JOLIET CENTRAL. Plaintiffs were required to pay approximately $40.00 for tuition for said night school courses though no tuition was charged for their regular day school sessions in which plaintiffs were enrolled prior to their expulsion. Further, minor plaintiffs were required to purchase books and materials for said night school courses in addition to books and materials which minor plaintiffs were required to have previously purchased for the regular classes at JOLIET CENTRAL. Further, the quality of education which plaintiffs have and will continue to receive at said night school session is substantially inferior to the quality of education which the minor plaintiffs would receive during the regular day sessions of JOLIET CENTRAL.

21. On or about Feburary 26, 1968, defendant DAVID R. ROSS informed minor plaintiffs that minor plaintiffs could expect bad recommendations for college applications. Further, defendant, DAVID R. ROSS stated that if minor plaintiffs were to publish another edition of "Grass High" it would mean an end to night school courses and the one day school course in which minor plaintiffs had been allowed to enroll.

22. The action of defendants in expelling minor plaintiff RAYMOND SCOVILLE and minor plaintiff, ARTHUR BREEN, was invalid and illegal in that it violated the First and Fourteenth Amendments to the Constitution of the United States of America for reasons that the standards by which minor plaintiffs were expelled:

(a) were applied by defendants in a manner which was arbitrary and unreasonable and deprived minor plaintiffs of their rights of free speech and free press. Defendants' threatened action will also deprive minor plaintiffs of their constitutionally protected rights;

(b) were not contained in any valid rule or regulation of defendant JOLIET CENTRAL or defendants JOLIET SCHOOL BOARD and were in excess of authority conferred upon defendants by the Illinois School Code, Ill. Rev. Stats. Ch. 122;

(c) were on their face arbitrary, unreasonable, vague, incapable of reasonable administration and without adequate guidelines for enforcement.

23. Irreparable damages have been done in the deprivation of plaintiffs' rights as set forth herein. Plaintiffs have no adequate remedy at law in that the deprivation is present and continuing and will extend into the future unless the defendants are enjoined by this court as hereinafter prayed; money damages cannot adequately compensate plaintiffs.

WHEREFORE, the plaintiffs pray that this court:

1. Delcare the action by defendants, expelling minor plaintiffs from JOLIET CENTRAL, illegal and unconstitutional.

2. Declare the standards by which minor plaintiffs were expelled, illegal and unconstitutional as applied to minor plaintiffs.

3. Pending the filing of an answer and hearing to determine this action, grant plaintiffs interlocutory injunction, without bond, and subsequently grant plaintiffs a permanent injunction:

(a) restraining the operation of said expulsion order, reinstating minor plaintiffs as full time regular session students at JOLIET CENTRAL and ordering defendants to facilitate minor plaintiffs transition into the semester currently in progress at JOLIET CENTRAL, with full academic credit; and

(b) restraining defendants, and each of them, their officers, agents, employees and representatives from in any way communicating to any school, college, university, or employer that minor plaintiffs involvement in the heretofore alleged publication and distribution of said literary journal, and the events subsequent thereto, in any way resulted in disciplinary proceedings or that said publication, distribution and subsequent events should be deemed in any way a negative reflection upon minor plaintiffs' character, reputation or qualification.

4. Order defendants to expunge the records of JOLIET CENTRAL and defendants of JOLIET SCHOOL BOARD of any evidence of any disciplinary recommendations or actions taken as a result of said publication, distribution and events subsequent thereto. In particular, that such records be expunged of the resolution of defendants JOLIET SCHOOL BOARD dated February 23, 1968.

5. Plaintiffs be awarded, as damages and costs of tuition fees by plaintiffs for said night school sessions and the costs of books and amterials which plaintiffs had bee required to purchase for said night school sessions.

6. Plaintiffs have such toher and further relief as is just.

7. Defendants pay plaintiffs' cost of this action.

TABLE OF CONTENTS

PAGE

Authorities Cited ii

Relevant Statutes 1

Issues 2

Statement of Case 3

Summary of Argument 7

Argument 9

I. THE SCHOOL COULD ONLY LIMIT LITERATURE WHICH PRESENTED AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE PRESENTATION OF CLASSROOM MATERIAL. 9

II. WHETHER PLAINTIFFS' JOURNAL CREATED SUBSTANTIAL AND IMMEDIATE DANGERS TO THE PRESENTATION OF CLASSROOM MATERIALS IS A FACTUAL ISSUE REQUIRING A BALANCING OF FACTORS. 12

   1. The Factors To Be Balanced. 12

   2. Defendants Cannot Avoid A Judicial Balancing of Competing Interests By The Imposition of Irrebuttable Presumptions. 15

III. PLAINTIFFS CANNOT BE EXPELLED FOR CRITICIZING PUBLIC SCHOOL OFFICIALS. 18

   1. Criticism of Public Officials Cannot Be A Valid Basis For Expulsion. 18

   2. Freedom To Criticize Is An Important Value In The High School. 21

In the

United States Court of Appea

For the Seventh Circuit

No. 17190

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Honorable Alexander J. Napoli, *Trial Judge.*

APPELLANTS' BRIEF

Paul M. Lurie
208 S. LaSalle Street
Chicago, Illinois 60604
Attorney for Plaintiffs-Appellants

Of Counsel:
Fohrman & Lurie
208 S. LaSalle Street
Chicago, Illinois 60604

PAGE

IV. THE ILLINOIS SCHOOL CODE WAS UNCONSTITUTIONALLY APPLIED. 25
  1. Where First Amendment Rights Are Infringed The Courts Must Examine Sufficiency of Evidence. 25
  2. The Illinois School Code Cannot Be Applied To Punish Peacefully Expressed Ideas. 26
  3. Failure To Give Adequate Notice of Prohibited Conduct Is A Fatal Flaw When Expression Is Attempted To Be Suppressed. 29
  4. The Court Must Consider Whether The State Could Have Accomplished Its Objectives Through More Precise Standards.. 32

CONCLUSION 33

AUTHORITIES CITED

CASES:

Adderley v. Florida, 385 U.S. 39 (1966) 24
Ashton v. Kentucky, 384 U.S. 195 (1966) 27, 28, 31
Bridges v. California, 314 U.S. 252 (1941) 18, 20
Brown v. Louisiana, 383 U.S. 131 (1966) 24, 25, 27
Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 10, 11, 14
Cox v. Lousiana, 379 U.S. 536 (1965) 9, 25, 27, 28, 31
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 31
Craig v. Harney, 331 U.S. 367 (1947) 20
Dennis v. U. S., 341 U.S. 494 (1951) 9, 13, 14, 25

PAGE

Dickey v. Alabama Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967) 14, 19
Edwards v. South Carolina, 372 U.S. 229 (1963) 25, 27, 31, 32
Feiner v. New York, 340 U.S. 314 (1951) 9, 14, 15
Garrison v. Louisiana, 379 U.S. 64 (1964) 13, 19
Ginzburg v. U. S., 383 U.S. 463 (1966) 9
Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967) 14
Interstate Circuit, Inc. v. Dallas, 366 F.2d 590, 598, 599 (5th Cir. 1966) 14, 22
Jacobellis v. Ohio, 378 U.S. 184 (1964) 26
Jorden v. DeGeorge, 341 U.S. 223 (1951) 29
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14, 21
Lanzetta v. New Jersey, 306 U.S. 453 (1939) 30
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 9
New York Times v. Sullivan, 376 U.S. 255 (1964) 9, 13, 19, 20
Pickering v. Board of Education, 20 L.Ed. 2d 811 (1968) 10, 12, 13, 14, 16, 17, 18, 19
Roth v. U. S., 354 U.S. 476 (1957) 9
Schenck v. U. S., 249 U.S. 47 (1918) 9
Shelton v. Tucker, 364 U.S. 479 (1960) 32
A. B. Small v. American Sugar Refinery Co., 267 U.S. 233 (1925) 29
Speiser v. Randall, 357 U.S. 513 (1958) 30
Smith v. California, 361 U.S. 147 (1959) 31
Sweezy v. New Hampshire, 354 U.S. 234 (1957) .. 14

PAGE

Terminiello v. Chicago, 337 U.S. 1 (1949) ..27, 28, 29

Thompson v. Louisville, 362 U.S. 199 (1960) 25

Tinker v. Des Moines Independent Community School District, 258 F. Supp. 971 (S.D. Iowa 1966) 11

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 14, 18, 22

Whitney v. California, 274 U.S. 357 (1927) 23

Wood v. Georgia, 370 U.S. 375 (1962) 13, 16, 19, 20, 26, 27

Wright v. Georgia, 373 U.S. 284 (1963) 27, 30

Yates v. U. S., 354 U.S. 298 (1957) 14, 23

STATUTES:

Illinois Revised Statutes, Chapter 122, § 10-22.6 .. 29

OTHER AUTHORITIES:

Model Penal Code § 250.2 (Proposed Official Draft) 32

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17190

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Honorable ALEXANDER J. NAPOLI, *Trial Judge.*

APPELLANTS' BRIEF

RELEVANT STATUTES

ILLINOIS REVISED STATUTE (1967)

CHAPTER 122
(Illinois School Code)

Sec. 10-22. *Powers of the Board.*

The school board shall have the powers enumerated in sections 10-22.1 through 10-22.34 . . .

Sec. 10-22.6 *Suspension or expulsion of pupils.* (a) to expel pupils guilty of gross disobedience or misconduct, and no action shall lie against them for such expulsion. Expulsion shall take place only after the parents have been requested to appear at a meeting of the board to discuss their child's behavior. Such request shall be made by registered or certified mail and shall state the time, place and purpose of the meeting. The board at such meeting shall state the reasons for dismissal and the date on which the expulsion is to become effective. (b) To suspend or by regulation to authorize the superintendent of the district or the principal superintendent of the district or the principal of any school to suspend pupils of gross disobedience or misconduct for a period not to exceed 7 days or until the next regular meeting of the board, whichever first occurs, and no action shall lie against them for such suspension.

ISSUES

1. Plaintiffs' Complaint alleges that the distribution of their journal created no disturbance which did or could have caused any commotion or disruption of high school classes. Can the Trial Court make an irrebuttable finding on the pleadings that printed words alone can create an immediate threat to the disruption of a school system, without considering evidence of the effect of the publication?

2. Can a broad, generally worded statute, aimed at the regulation of disruptive conduct, be applied to punish the publication of a journal which has not had any disruptive effect, in the absence of a clearly drawn regulation warning that particular printed expression will be prohibited?

3. Did the Trial Court abuse its discretion in not granting plaintiff's Motion For a Temporary Injunction?

STATEMENT OF THE CASE

On April 17, 1968 minor plaintiffs, through their fathers, filed an action seeking to declare invalid under the First and Fourteenth Amendment to the United States Constitution minor plaintiffs' expulsion from a public high school solely for publishing a journal which contained criticisms of school administrators. Plaintiffs seek to enjoin the enforcement of the expulsion order and to enjoin defendant's communication to future employers or schools that plaintiffs' publication and distribution of their journal should be deemed in any way a negative reflection upon plaintiff's character, reputation or qualifications. Further, plaintiffs seek incidental damages.

On April 17, 1968, plaintiffs filed a Motion for Interlocutory Injunction, requesting plaintiffs be reinstated in the regular day-school sessions of Joliet Central and that the defendants be restrained from communicating to employers or schools comments which cast a negative reflection upon minor plaintiffs' character, reputation and qualifications as a result of their publication. On May 3, 1968, defendants filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that the Complaint failed to state a claim upon which relief could be granted or in the alternative that the Court lacked jurisdiction. On May 14, 1968, defendants filed an Answer to plaintiffs' Complaint.

On July 19, 1968, the Trial Court granted defendants' Motion to Dismiss and entered judgment on the pleadings in favor of defendants and against plaintiffs. In essence, the Trial Court held that plaintiff's editorial "My Reply" (App. 13), which was critical of school administrators and school rules, presented an irrebuttable presumption of a "clear and present danger" to the "orderly maintenance of a public school system" (App. 42); this presumption was applied without consideration of the context of the language, the circumstances of the utterances, or the lack of disruptive effect on classroom activities.

Raymond Scoville and Arthur Breen (who are referred to in this Brief as the plaintiffs) were in January, 1967, aged 17 and in their junior year at Joliet Central High School. Defendant Arthur L. Bruning was the Superintendent of the three high schools administered by the Board of Education of Joliet Township, District 204, County of Will, State of Illinois. Defendant David R. Ross was the Principal of Joliet Central High School; defendant Howard Johnson was Junior Dean of Joliet Central, and defendant Clayton Wintersteen was the Senior Dean of Joliet Central High School. Both plaintiffs were above-average students and active in extracurricular activities. Plaintiffs were on the debate team and plaintiff Raymond Scoville was Literary Editor of the official high school newspaper.

Plaintiffs desired to publish a journal containing the creative efforts of themselves and their fellow students. Plaintiffs wrote and solicited material for their new journal and published it at their own cost off the school premises. The 16-page journal contained original poetry, essays, music reviews, movie reviews, short stories, graffiti, and editorial criticism of school administrators and procedures.

On January 15, 1968, plaintiffs distributed 60 copies of the first edition of their journal, Grass High (App. 10-22) among students and faculty at Joliet Central, charging a price of 15¢ per copy. Where distribution was made in classrooms, there was consent of the teachers. At no time did the distribution create a disturbance which did

or could have caused any commotion or disruption of classes at Joliet Central. Plaintiffs were never advised to cease the distribution by any teacher or administrator at the high school. Prior and subsequent to plaintiffs' distribution of the journal, there was no code of student behavior or announced student rules governing student publications or criticism of school administrators. In particular, there were no rules against criticism of school administrators or policies.

The distribution was made without incident, and for three days, no action was taken against the plaintiffs. On January 18, 1968, defendant Clayton Wintersteen advised plaintiffs that they would be punished for their publication. However, at that time no charges were made that the publication had interfered in any way with the orderly administration of classes at Joliet Central.

On January 22, 1968, plaintiffs were advised that they were suspended from high school for the first five days of the Spring, 1968 semester; still no formal charges had been made against the plaintiffs. On January 31, 1968, plaintiff Raymond Scoville was notified by defendants that he was no longer an editor of the high school newspaper. On February 6, 1968, plaintiffs' parents received a letter from defendant Arthur Bruning stating that he would recommend to the School Board that plaintiffs be expelled for the remainder of the school term:

> "Serious misbehavior in the form of public use of objectionable language and the publication and in-school sale of inappropriate statements about school staff members require stern action on our part." (Complaint Exhibit 2, App. 23).

The letter to plaintiff Raymond Scoville's parents ended: "Raymond is a bright and talented young man, and we are anxious to see him re-establish his potential through a renewed responsibility and commitment." (Complaint Exhibit 2., App. 23).

On February 23, 1968, at a meeting of the defendant School Board, a Resolution of Expulsion was passed finding that plaintiffs were guilty of "gross misconduct" and "gross disobedience" within the meaning of the Illinois School Code, Sec. 10-22.6 for the reason that plaintiffs' preparation and distribution for sale of Grass High:

"(1) Constitutes a public use of inappropriate and indecent language,

(2) Constitutes a violation of established rules of said School District,

(3) Constitutes a disregard of and contempt for authorities charged with the administration of said Central Campus and said School District,

(4) Encourages the disregard and disobedience of orders promulgated by the duly constituted authorities of said Central Campus and said School District,

(5) Involves other students as parties to the preparation and distribution of the aforesaid writing who were, in fact, not parties thereto;" (Complaint Exhibit 3., App. 24).

As a result of said expulsion, plaintiffs were forced to complete their studies for the Spring, 1968 semester in night school except for the one course which plaintiffs were allowed to continue during the regular day-session. Plaintiffs were required to pay approximately $40.00 for tuition for the night-school courses, though no tuition was charged for their regular day-school sessions. Plaintiffs were required to purchase books and materials for the night school courses in addition to books and materials which they were required to have previously purchased for the regular classes at Joliet Central High School. The quality of education which they received at the night school session was substantially inferior to the quality of education which they would have received during the regular day sessions at Joliet Central High School.

On February 26, 1968, defendant David Ross informed plaintiffs they could expect bad recommendations for college applications as a result of their publication of Grass High. Further, David Ross threatened plaintiffs that if they were to publish another edition of the journal, it would mean an end to night school courses and the one day-school course in which plaintiffs had been allowed to enroll.

SUMMARY OF ARGUMENT

The sole basis for the Trial Court's decision was plaintiffs' critical editorial "My Reply" case. There is nothing in the record below to indicate that plaintiffs' comments disrupted the presentation of classroom activities.

Under the rules of *Burnside* v. *Byars*, 363, F. 2d 744 (5th. Cir., 1966) and *Pickering* v. *Board of Education*, 20 L.Ed. 2d 811 (1968), the only state interest which defendants could assert to be paramount to plaintiffs' right of free press was defendants' right to prevent disruption of classroom activities. There was no evidence of an invasion of such state interest before the Trial Court. In addition, the Trial Court's determination that plaintiffs' journal threatened the entire school system is wholly without support in the Resolution of Expulsion. (App. 24, 25).

The Trial Court considered certain words used in plaintiffs' editorial "My Reply" as *per se* an immediate and serious enough danger to the "orderly maintenance of a public school system" to justify the suppress of First

Amendment freedoms. (App. 39). The Trial Court made this determination that plaintiffs' publication was unprotected without hearing any evidence of how this meager journal distributed to 60 of thousands of students threatened to jeopardize the entire Joliet school system. Most importantly, the Trial Court failed to consider the evidence necessary to balance the importance of the state interest threatened, with the importance for creative expression and criticism in high schools, with the probability the speech will actually disrupt the school system, and with the availability of more moderate controls than those the state was attempting to justify.

The United States Supreme Court has rejected the use of irrebuttable presumptions which preclude careful consideration and balancing of factors where First Amendment freedoms are attempted to be suppressed. ***Wood*** **v.** ***Georgia,*** **370 U.S. 375 (1962).**

At the time of plaintiffs' expulsion, there were no announced rules or regulations prohibiting plaintiffs' journal or the words contained therein. In order to justify plaintiffs' expulsion, defendants have attempted to apply the broad language of the Illinois School Code which prohibits "gross misconduct" or "gross misobedience" to punish pure speech which does not involve disruptive conduct. In the absence of a clearly drawn regulation giving adequate notice of the prohibited unlawful activity, constitutional standards will not permit suppression of protected expression by vague, broad, and general laws. ***Edwards*** **v.** ***South Carolina,*** **372 U.S. 229 (1963),** ***Cox*** **v.** ***Louisiana,*** **379 U.S. 536, 559 (1965).**

ARGUMENT

I. THE SCHOOL COULD ONLY LIMIT LITERATURE WHICH PRESENTED AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE PRESENTATION OF CLASSROOM MATERIAL.

If plaintiffs' journal had not been distributed on school grounds and had not been critical of defendants, their editorial comments would have been constitutionally protected.[1] As the Trial Court admitted:

> "[R]esponsible criticism of school administrative officials is no less protected by the First Amendment
>
> than responsible criticism of other state officials . . . "[O]n a street or on a public park, . . . the rights of free speech are virtually absolute." (App. 41, 42)

The Trial Court held that because plaintiffs were students and their journal was distributed in the school, their speech was not protected by the constitutional standards otherwise available to them as citizens. However, the only state interest peculiar to the student-school relationship which may be paramount to First Amendment rights is the administrators' right to limit conduct which is disruptive of the presentation of classroom materials. *Burnside* v. *Byars*, 363 F. 2d 744 (5th Cir. 1966), *Pickering* v. *Board of Education*, 20 L.Ed. 2d 811 (1968). *Burnside* v. *Byars*, which the Trial Court cited as authority, held that high school administrators cannot expel students for expression which does not under the circumstances of its publication materially and substantially interfere with the orderly presentation of classroom materials. 363 F. 2d 744, 748. Students cannot be expelled from peacefully-made expression with which the administrators disagree:

---

[1] Nothing contained in the journal posed a threat to the right of government to maintain its existence. *Schenck* v. *U. S.*, 249 U.S. 47 (1918); *Dennis* v. *U.S.*, 341 U.S. 494 (1951); nor to the right of government to conduct its normal function. *Cox* v. *Louisiana*, 379 U.S. 559 (1965). The words used were not recklessly or knowingly libelous of public officials under the standards of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); the words did not pose a threat to a breach of the peace as they did under the circumstances of *Feiner* v. *New York*, 340 U.S. 315 (1951); nor were the words obscene under the standards of *Roth* v. *U.S.*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); or *Ginzburg* v. *U.S.*, 383 U.S. 463 (1966).

> "[W]e must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 363 F.2d 744, 749.

In *Burnside* v. *Byars*, the defendant high school administrators had determined that the wearing of certain slogan buttons would '"cause commotion [and] be disturbing [to] the school program by taking up time to get order, passing [the buttons] around and discussing them in the classrooms and explaining to the next child why they were wearing them."' 363 F. 2d 744, 747. Pursuant to this finding, and the general authority to discipline as contained in a student handbook,[2] the principal announced

that the slogan buttons would not be permitted to be worn on the school premises. After this clear warning, plaintiffs deliberately wore the buttons and were expelled for this exercise of expression.[3] Plaintiffs brought suit for reinstatement pursuant to Title 42 U.S.C. 1983 and Title 28 U.S.C. 1343. The District Court denied a preliminary injunction and plaintiffs appealed.

The Circuit Court of Appeals not only reversed, but held that the District Court had abused its discretion in not granting the injunction. The Fifth Circuit found that plaintiffs' activity had not interfered with the learning process and the mere presence of slogan buttons was not sufficient to justify the harsh punishment invoked against these children. As in the instant case, defendants in *Burnside* v *Byars* contended that their actions were reasonable to maintain proper discipline in the school. The Appellate Court disagreed and held that the only rules which will be permitted to infringe upon First Amendment rights are those "necessary for the orderly presentation of classroom activities."[4] 363 F. 2d 744, 748. The Court illustrated constitutionally permissible rules: those assigning students to particular classes, those forbidding unnecessary discussion in the classroom and those prohibiting the exchange of conversation between students. 363 F. 2d 744, 748.

---

[2] No such code of student behavior or regulation forbidding plaintiffs' conduct existed at the time plaintiffs distributed their journal.

[3] In the instant case, plaintiffs were not warned that they were engaging in unlawful activity.

[4] *Contra. Tinker* v. *Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa, 1966) affirmed by an equally divided court sitting en banc, 383 F. 2d 988 (8th Cir., 1967). The Trial Court adopted a view that a rule forbidding the wearing an anti-war arm bands was reasonable even if there was no material or substantial interference with classroom activity. The Supreme Court has granted certiorari 390 U.S. 942 and oral arguments have been made.

Pickering v. *Board of Education,* 20 L. Ed 2d 811 (1968) involved the suspension of a high school teacher for a letter which Pickering had written to a local newspaper critical of the school administrators. In *Pickering,* the school administrators contended that the fact the petitioner-teacher participated in the education of youngsters justified suppression of criticism of superiors. The Illinois Supreme Court, whose judgment was reversed relied on just such a ground:

> "Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." 20 L. Ed. 2d 811, 816.

The U. S. Supreme Court reversed, holding that:

> "What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 20 L. Ed. 2d 811, 819-20.

II. WHETHER PLAINTIFFS' JOURNAL CREATED SUBSTANTIAL AND IMMEDIATE DANGERS TO THE PRESENTATION OF CLASSROOM MATERIALS IS A FACTUAL ISSUE REQUIRING A BALANCING OF FACTORS.

1. The Factors To Be Balanced.

Freedom of the press is a "preferred freedom" and the state has the burden to prove a substantive interest to

justify suppression. *Wood* v. *Georgia,* 370 U. S. 375, 386 (1962).

Freedom of expression and especially freedom to publish have important functions in a democratic society, where "official truth" is a relative and constantly evolving concept. In our society we believe that "free debate of ideas will result in the wisest governmental policies" *Dennis* v. *U. S.,* 341 U. S. 494, 503, (1951), and will "keep a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart." *Dennis* v. *U. S., supra,* 341 U. S. at p. 584. (Douglas, dissenting.)

As a result of the principle of the "preferred position" of expression, speech may be limited only when after all the circumstances of the utterance are considered, the state has proved its allegedly threatened interest is more important than the occasion for speech, and that threat to the state interest is immediate:

> 'In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger.' Learned Hand quoted in *Dennis* v. *U. S.,* 341 U. S. 494, 510 (1951).

The determination of whether expression may be constitutionally suppressed is peculiarly a balancing problem requiring a factual inquiry. The court must consider: (1) The importance of the state interest allegedly threatened; e. g., prevention of sedition would be a high interest, *Dennis* v. *U. S.,* 341 U. S. 494 (1951); but suppression of criticism of public officials would a low interest. *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811 (1968); *Wood* v. *Georgia,* 370 U. S. 375, (1962); *New York Times* v. *Sullivan,* 376 U. S. 255 (1964); *Garrison* v. *Louisiana* 379 U. S. 64 (1964).

(2) The value of the occasion for speech. In a school whose purpose is to stimulate thought and instill democratic principles, expression should be highly valued. *Burnside* v. *Byars, supra,* p. 10; *West Virginia Board of Education* v. *Barnette,* 319 U. S. 674 (1943); *Dickey* v. *Alabama Board of Education,* 273 F.Supp. 613 (M. D. Ala. 1967); *Hammond* v. *South Carolina State College,* 272 F. Supp. 947 (D. S. C. 1967); cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957) and *Keyishian* v. *Board of Regents* 385 U. S. 589, 603 (1967).

(3) The probability that the invasion of the state interest will be accomplished. The probability would be high if the utterances were made to an already agitated crowd. *Feiner* v. *New York,* 340 U. S. 315 (1951), but very low where the persons exposed to the speech were a small, uncohesive group, not oriented to action. *Yates* v. *U. S.,* 354 U. S. 298 (1957).

(4) The availability of more moderate controls than those the state is attempting to justify. Suppression and punishment would not be appropriate to protect state interests where communication to correct fallacy is available:

> 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence.' Brandeis concurring in *Whitney* v. *California,* 274 U. S. 357, quoted by Justice Douglas dissenting in *Dennis* v. *U.S.* 341 U. S. 494, 586, (1951).

The corrective power of more speech is a realistic method of dealing with written criticism of school officials alleged to be detrimental. *Pickering* v. *Board of Education,* 20 L. Ed 2d 811 but unrealistic as a means of protecting

---

the peace when intentional incendiary harangues are being given to an excited crowd. *Feiner* v. *New York,* 340 U. S. 315 (1951).

An analysis of these factors in the instant case results in the conclusion that defendants did not sustain their burden to prove that plaintiffs' publication of "Grass High" resulted in one of rare instances where critical expression may be punished. The danger of disruption to the Joliet school system was remote, considering the literary orientation of the journal, its non-incendiary tone, its limited distribution, and its lack of adverse effect. The value of allowing the publication as an outlet for creativ expression and as a means peacefully communicating student discontent to administrators is superior to protecting professional school administrators from the criticism. School administrators have the ability and means to answe criticism, therefore suppression of plaintiffs' publication should have been the last action taken, not the first.

2. Defendants Cannot Avoid A Judicial Balancin Of Competing Interests By The Imposition O Irrebuttable Presumptions.

Plaintiffs alleged in their Complaint that their publication caused no danger to the only interest which defendants could constitutionally assert: the prevention o disruption of classroom activities. *Burnside* v. *Byars supra.,* p. 10. The trial court deemed these allegation true for purposes of defendants' motion:

> "At no time did said distribution create a disturban which did or could have caused any commotion o disruption of classes at Joliet Central." Plaintiff Complaint, paragraph 9 (App. 3).

However, the Trial Court erroneously concluded, without hearing evidence, that plaintiffs' "speech itself" constituted "a direct and substantial threat to the successful operation of the school." (App. 41):

> "It is apparent from the face of the Complaint here that the minor plaintiffs had engaged in speech on school grounds which amounted to an immediate advocacy of, incitement to, and disregard of, school administrative procedures." (App. 41).

This finding was not even made in the defendants' Resolution of February 23, 1968 (App. 24, 25) expelling the plaintiffs. The Trial Court's holding can only be explained, by a irrebuttable presumption that plaintiffs' journal, regardless of proof of actual effect, created a "clear and present danger" to disruption of classes at Joliet Central. The Supreme Court has expressly rejected *per se* rules which consider words constitutionally unprotected, without proof of actual and detrimental effects. ***Wood*** v. ***Georgia,*** 370 U. S. 375; and ***Pickering*** v. ***Board of Education,*** 20 L. Ed. 2d 811 (1968).

Wood v. ***Georgia*** involved the constitutionality of a contempt citation against a county sheriff whom the District Court had found guilty of using language in a press release which the District Court characterized as ridiculing and interfering with a grand jury investigation and intentionally being contemptuous of the court. The contempt citation was predicated upon a theory that "the mere publishing of the news release [and defendants making of certain public statement] constituted a contempt of court, and of itself was a 'clear and present danger' to the administration of justice." 370 U. S. 375, 382.

The Supreme Court reversed the contempt citation and rejected the *per se* rule. The Court recognized that protection of the judicial system was a paramount state interest which may be superior to the petitioner's right of speech and press. However, the Court could find no evidence that petitioner's conduct actually did present a "clear and present danger" to the functioning of the judicial system. A conclusion that the words used would have the automatic effect ascribed to them by the state officials was insufficient; the effect must be proven:

> "Thus we have simply been told, as a matter of law without factual support [that] a clear and present danger will be created." 370 U. S. 375, 388.

In ***Pickering*** v. ***Board of Education,*** 20 L. Ed. 2d 811, (1968) petitioner, a school teacher, was dismissed from his employment as a Lockport, Illinois, high school because of a certain letter which he had published in a local newspaper critical of school policies. The defendant school board charged that the "publication of the letter damaged the professional reputations of the Board, and the superintendent and would foment controversy and conflict among the Board, teachers, administrators and residents of the district." 20 L. Ed. 2d 811, 816. In reversing and remanding, the Supreme Court noted that there was no evidence introduced in the state courts to show that the letter actually had any detrimental effect on the operation of the schools, but rather:

> "The Board must, therefore, have decided perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools." 20 L. Ed. 2d 811, 819.

The Court held that absent a showing of detrimental effect upon a paramount state interest, Pickering could not be dismissed for the mere use of words:

> "[Pickering made statements] which are critical of his ultimate employer but which are ***neither shown nor can be presumed*** to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of schools generally." 20 L. Ed. 819. (emphasis supplied)

III. PLAINTIFFS CANNOT BE EXPELLED FOR CRITICIZING PUBLIC SCHOOL OFFICIALS.

1. Criticism of Public Officials Cannot Be A Valid Basis For Expulsion.

Defendants assert that prevention of disrespect and "contempt" justifies plaintiffs' expulsion regardless of the lack of any disruptive effect of the journal on classroom activity.[5] The terms "disrespect" and "contempt" are inherent in every criticism, for every criticism challenges authority. But it is just this "right to differ as to things that touch the heart of the existing order" that is the essence of the First Amendment freedom." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

Expression may be constitutionally inhibited only where it is subordinate to other individual's societal rights. However, the suppression of criticism of public officials, as in the instant case, does not promote a societal good; rather, its purpose is to insulate the defendants from critical comment. The Supreme Court has consistently refused to shield public officials from criticism, and stated that it is a fallacy to assume that respect is promoted by suppression of criticism. *Bridges* v. *California,*

314 U. S. 252 (1941); *New York Times* v. *Sullivan,* 376 U. S. 255 (1964); *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811 (1968).

A recent case involving student publications, rejected "insubordination" as a legitimate state interest justifying expulsion. In *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (M. D. Ala., 1967) the plaintiff was editor of the college newspaper. Plaintiff had sought and was denied permission to publish an editorial which was critical of the state government. Although forbidden to publish on the subject in controversy, plaintiff published in the school newspaper a caption and the word "censored" in the space where the editorial should have been. Because plaintiff had acted contrary to the advice of his faculty adviser and the president of the school, he was found to have committed 'willful and deliberate insubordination' and was suspended. 273 F. Supp. 613, 617. The District Court declared the action of explusion void, and ordered plaintiff's reinstatement with costs to the plaintiff.

The *Dickey* Court relied upon *Burnside* v. *Byars, supra,* p. 10, and held that plaintiff could not constitutionally be expelled for exercising "his constitutionally guaranteed right of academic and/or political expression." 273 F. Supp. 613, 618 and such expulsion could not be justified by the characterization of 'insubordination.' As in the instant case, defendants argued that readmission of plaintiff would jeopardize discipline in the schools. This proposition was summarily rejected by the *Dickey* Court because of its failure to consider the societal damage of such a rule.

> "Defendants' argument that [plaintiff's] readmission will jeopardize the discipline in the institution is

---

[5] Defendant's Resolution of February 23, 1968 found that the distribution of GRASS HIGH constitutes a "disregard of and contempt for the authorities charged with the administration of said Central Campus and said School District . . .". (App. 25)

superficial and completely ignores the greater damage to college students that will result from the imposition of intellectual restraints such as . . . in this case." 273 F. Supp. 619.

Public officials, including high school administrators, whose positions make criticism an occupational hazard, are presumed to be "hardy men" able to perform their difficult tasks even when criticized by two seventeen year old high school students. *Craig* v. *Harney,* 331 U. S. 367 (1947). Also see *New York Times* v. *Sullivan,* 376 U. S. 255 (1964). Plaintiffs' meager journal, considering its content and distribution among sixty out of thousands of students, did not result in any great loss of respect for defendants, let alone disrupt classes.

In a series of U. S. Supreme Court cases involving contempt citations for attacks upon the judicial system, the judiciary asserted that the language used tended to diminish the respect which the public would have for the bench and thus to prejudice the administration of justice. However, even with such a vital interest as the administration of justice threatened, the Courts have uniformly upheld the criticism as protected by the First and Fourteenth Amendments. *Bridges* v. *California,* 314 U. S. 252 (1941); *Craig* v. *Harney,* 331 U. S. 367 (1947); and *Wood* v. *Georgia,* 370 U. S. (1962).

> [A]n enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect. Justice Black in *Bridges* v. *California,* 314 U. S. 352, 271.

2. Freedom To Criticize Is An Important Value In The High School.

The value of maximum freedom of expression in the schools must be balanced against the relative lack of seriousness of the dangers as alleged in defendants' Resolution of February 23, 1968. (App. 24, 25). Nowhere is the "value of the occasion" for speech more important than in the schools. Schools are training our young people for citizenship and to be able to compete in a constantly changing world. Therefore, exposure to a multitude of ideas should be tolerated as in any other segment of society. Suppression of the minds of young and punishment for disagreement does disservice not only to the development of the student as an individual, but to democratic society, which thrives on the expression of contrary views:

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of the multitude of tongues [rather] than through any kind of authoritative selection." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967) citing *U. S.* v. *Associated Press,* 42 F. 2d 362, 372.

Shortly after leaving high school, most of our young men are being asked to fight and to die to preserve the principles of our free society. These principles should not become meaningless words upon the pages of a civics text:

> "That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach

> youth to discount important principles of our Government as mere platitudes." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 637.

While educators are to be given wide latitude in educating the young, censorship of expression, because of disagreement or personal distaste, solely in the name of "education" offers little to commend itself when compared to the educational value of free exchange of ideas:

> "While we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor." *Interstate Circuit, Inc.* v. *Dallas* 366 F. 2d 590, 598, 599. (5th Cir. 1966) vacated and remanded on other grounds 391 U.S. 53 (1968).

Allowing maximum expression of student disagreement, in peaceful written form, will greatly aid school administrators in dealing with present student unrest. Such student publications will allow administrators insight into the student thinking, will anticipate student problems before they expand, and will increase rapport between students and administrators. School administrators, do not exercise their functions in "baronial castles." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624. If peaceful channels of protest are not made available to students, more violent ones will most likely be found. This is the lesson of history and the pragmatic reason for the Constitutional guarantees of our liberties:

> "[Those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney* v. *California*, 274 U. S. 357 (1927). (Brandeis, concurring).

The primary purpose of plaintiffs' journal was to provide an outlet for creative and constructive expression. This was not a single purpose tract devoted to advocacy of any particular disruptive action, nor an incendiary speech advocating unlawful activity, nor had either of the plaintiffs even presented any discipline problems. Rather, a minor part of the publication at issue contained criticism of the school administration by concerned students. Plaintiffs' publication was certainly a more reasonable form for criticism than the more violent and disruptive methods which appear to be sweeping high school and college campuses as a direct result of suppression by school officials of more peaceful forms of protest.

When balancing the need for free press against other state interests, the size, cohesiveness and orientation towards action of the group towards whom the publication is directed are important factors in determining how immediate is the "clear and present" danger to the paramount state interest. *Yates* v. *U. S.*, 354 U. S. 298 (1957). Plaintiffs' journal was distributed to sixty out of several thousand students. The distribution was not made in any meeting where disruptive ideas were being advocated nor did the distributees have any predisposition towards disruption.

Unlike any other segment of society, high school administrators have unique power to correct fallacies and influence behavior which may result from student criticism. Because administrators control resources of communication vastly superior to those open to students, school administrators can allow more dissent and criticism without fear of adverse consequences.

The Trial Court relied on *Adderley* v. *Florida*, 385 U. S. 39 (1966), which upheld the right of the state to limit demonstrations on jail property. However, unlike a jail, the maximum of expression should be tolerated in a school. The "special purpose" of a school is to educate the young for citizenship, to teach them the meaning of our open society, and to teach them to think and to apply creative effort to solve the difficult social problems of the times. In addition, *Adderley* is not applicable here because plaintiffs were expelled for the content of their speech, not where it was said. In *Adderley*, the petitioners were punished not for what they said, but where it was said:

> "There is not a shred of evidence in this record that this power was exercised, . . . because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses." 385 U. S. 39, 47.

In *Brown* v. *Louisiana*, 383 U. S. 131 (1966) the Court again stated that expression cannot be suppressed solely because of where it is said, unless the place has some relevance to an effect which the state may legitimately prevent. *Brown* v. *Louisiana* involved a sit-in in a public library. The State argued that special consideration should be given to the fact that the expression was exercised in a public library, "a place dedicated to quiet, to knowledge, and to beauty." 383 U. S. 131, 142. The Court in reversing the breach of the peace conviction stated that there was no evidence that the petitioner's conduct disturbed the library's users.

IV. THE ILLINOIS SCHOOL CODE WAS UNCONSTITUTIONAL AS APPLIED.

1. Where First Amendment Rights Are Infringed, The Courts Must Examine Sufficiency of Evidence.

The Trial Court based its judgment on the grounds that one sentence in plaintiffs' editorial "My Reply" constituted speech amounting to an "immediate advocacy of, and incitement to, disregard of school administrative procedures" and "legitimate administrative regulations." (App. 42). However, the trial court record does not indicate that there existed any such "administrative procedures" or "administrative regulations". Neither does the record indicate the existence of any disciplinary rule against the advocacy of change in school procedures or regulations. cf. *Dennis* v. *U. S.*, 341 U. S. 494 (1951). The record does not support the finding that plaintiffs' "pure speech" can be equated with "gross misconduct" or "gross disobedience" within the meaning of the Illinois School Code.

Where First Amendment rights are infringed, the Court must review the evidence to determine its sufficiency to justify violation of the imposed standard. The absence of evidence to support a finding which results in punishment may be raised on review and will justify reversal. *Thompson* v. *Louisville*, 362 U. S. 199 (1960), *Edwards* v. *South Carolina*, 372, U. S. 229 (1963), *Cox* v. *Louisiana*, 379, U. S. 536 (1965), *Brown* v. *Louisiana*, 383 U. S. 131 (1966).

The words of the Supreme Court in *Brown* v. *Louisiana* are equally applicable in the instant matter:

> "There was no disturbance of others, no disruption of library activities, and no violation of any library regulation." 383 U. S. 131, 142.

No finding of the defendants could bind this Court in its review to determine whether constitutional standards were violated. *Wood* v. *Georgia,* 370 U. S. 375, 386; as was stated in *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964):

> "But State courts may not preclude us from our responsibility to examine "the evidence to see whether it furnishes a rational basis for the characterization put on it. *In re Sawyer,* 360 U. S., 622, 628." 379 U. S. 375, 386.

2. The Illinois School Code Cannot Be Applied To Punish Peacefully Expressed Ideas.

The Illinois legislature in enacting the Illinois School Code, specifically required a finding of disruptive conduct to justify expulsion; nowhere does the School Code proscribe nor could it constitutionally limit the exercise of peacefully made written expression. Chapter 122 of the Ill. Rev. Stat. Sec. 10-22.6 provides:

> "[The School Board] has the power to (a) expel students guilty of gross disobedience or misconduct . . ."

Defendants have attempted to expand the meaning of the School Code to include the peaceful expression of criticism. The Resolution of February 23, 1968 provides as one of the grounds for plaintiffs' expulsion, that plaintiff were:

> "[Encouraging] the disregard and disobedience of orders promulgated by the duly constituted authority of said Central Campus, in said school district." (App. 25).

The Trial Court further expanded upon the School Code, by characterizing plaintiffs' publication as amounting "to an immediate advocacy of, incitement to, and disregard of school administrative procedures." (App. 42).

While legislative determination is ordinarily given weight in determining reasonableness, the plaintiffs' conduct had not been previously determined to be unlawful, and therefore, we are not dealing here with a regulation, 'encased in the armour wrought by prior legislative deliberation.' *Bridges* v. *California,* 314 U. S. 252, cited in *Wood* v. *Georgia,* 370 U. S. 375, 386.

Aside from lack of evidence to support such findings, plaintiffs could not be constitutionally punished for the peaceable expression of unpopular ideas. To the extent the School Code was applied to protected expression, it is unconstitutional. *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Ashton* v. *Kentucky,* 384 U. S. 195 (1966); *Brown* v. *Louisiana,* 383 U. S. 131 (1966):

> "[A] generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent it fails to give adequate warning of the boundary line between the constitutionally permissable and the constitutionally unpermissable application of the statute." *Wright* v. *Georgia,* 373 U. S. 284, 292.

In *Cox* v. *Louisiana,* 379 U. S. 536 (1965), petitioners were involved in a civil rights march to the courthouse which terminated in loud cheering, clapping and the petitioners' urging of sit-ins at lunch counters. The city officials feared violence because the activity was centered in a predominantly white business district in Baton Rouge. Petitioner was charged with a "breach of the peace" which included as an element: "congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace might be occasioned." The Louisiana courts had further defined "breach of the peace" to mean 'to agitate, to arouse from a state of repose, to molest, to interupt, to hinder, to disquiet.' 379 U. S. 536, 551.

Petitioner's conviction was reversed on the grounds *inter alia* that the statute as interpreted would allow conviction for "peacefully expressing unpopular views." 379 U. S. 536, 551:

> "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise. *Watson* v. *Memphis*, 337 U. S. 526, 535." 379 U. S. 536, 551.

In *Ashton* v. *Kentucky*, 384 U. S. 195, (1966), petitioner was convicted for distributing on a limited basis a pamphlet which was critical of certain local townspeople and officials in connection with a labor dispute. The Trial Court found that petitioner's conduct constituted the common-law crime of criminal libel; this was defined to include 'any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable.' 384 U. S. 195, 198. The Supreme Court reversed on the ground that the definition of the crime allowed punishment for the peaceful expression of ideas.

Ashton v. *Kentucky* relied upon *Terminiello* v. *Chicago*, 337 U. S. 1. *Terminiello* struck down a Chicago breach-of-the peace ordinance which the lower courts deemed applicable to conduct 'if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.' The Court characterized the essence of the constitutional infirmity as the allowing of standards of punishable conduct to depend upon "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments

per se." The Court held that such a "wide open" standard allows a person to be punished for exercising protected expression because 'his neighbors have no self-control.' Quoting Chafee, *Free Press in the United States*, 151 (1954), 384, U. S. 195, 200."

3. Failure To Give Adequate Notice Of Prohibited Conduct Is A Fatal Flaw When Expression Is Attempted To Be Suppressed.

The only authority which defendants cite to justify plaintiffs' expulsion is the Illinois School Code, Ill. Rev. Stat. Ch. 122, Sec. 10.22.6. At the time of plaintiffs' expulsion, there was no student behavioral code nor any announced rule which even remotely warned plaintiffs that anything contained in their journal was punishable by expulsion. As an after-the-fact rationale, defendants have attempted to unconstitutionally characterize the publishing of plaintiffs' journal as "gross misconduct" or "gross disobedience" within the meaning of the Illinois School Code.

Regardless of the nature of the penalties, all governmental prohibitions involving sanctions which give no adequate guidelines are unconstitutionally vague. *Jorden* v. *DeGeorge*, 341 U. S. 223 (1951).

> "It is not the . . . penalty itself that [is] invalid, but the exaction of obedience to a rule or standard [that is] so vague and indefinite to be no rule or standard at all." *A. B. Small* v. *American Sugar Refinery Co.*, 267 U. S. 233 (1925).

The allegation of the Resolution of February 23, 1968 are erroneous to the extent that they refer to promulgated "orders" which plaintiffs allegedly encouraged to be disregarded. There were no such orders. Defendants may not regulate legitimate state interests by vague prohibitions concerning which ordinary persons must speculate what is prohibited and what is forbidden. *Speiser* v. *Randall*, 357 U. S. 531 (1958).

> "All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 453 (1939).

In *Wright* v. *Georgia*, 373 U.S. 284 (1962), petitioners were charged and convicted of assembling for the purpose of 'disturbing the public peace . . . and not dispersing at the command of the officers.' 373 U.S. 284, 287. In attempting to justify the breach of the peace conviction, the State argued that the petitioners had violated a rule which reserved the playground for younger people at the time the petitioners were admittedly using the park. The evidence established that the police officers did not warn petitioners of this rule nor were there any printed regulations giving notice of the rule. The Court held that the statute as applied was unconstitutionally vague:

> "Under any view of the facts alleged to constitute the violation it cannot be maintained that petitioners had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process [citing cases]." 373 U.S. 284, 293.

Vague prohibitions, which are applied to proscribe speech or press, necessarily have a "chilling effect" on protected expression; in attempting to avoid punishment imposed by vague standards, citizens will limit their expression more than is constitutionally required. Vague

standards have an inhibitory effect on all conduct, but a generally worded statute may be tolerated if applicable solely to conduct outside the protection of the first amendment. Vagueness will not be tolerated to the extent guessing as to the meaning and application may have in inhibitory effect on expression. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or the power of the press suffer. *Ashton* v. *Kentucky*, 384 U.S. 195, 200.

In *Edwards* v. *South Carolina*, 372 U.S. 229, the State attempted to use a broad "breach-of-the-peace" statute to justify suppression of a parade.[6] Mr. Justice Stewart held for the majority that these broad statutes could not be constitutionally applied to prohibit speech; the evil was the application of the statute to suppress speech without prior and sufficient warning:

> "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioner had been convicted upon evidence that they

---

[6] The language of that breach-of-the-peace statute was even more precise than the Illinois School Code: "A violation of public order, a disturbance of public tranquility by any act or conduct enciting to violence . . . any violation of any law enacted to preserve peace and good order." 372 U.S. 229, 234.

had violated a law regulating traffic, or had disobeyed a law reasonably limited the period during which the State House grounds were open to the public, this would be a different case . . ." *Edwards* v. *South Carolina*, 342 U.S. 229, 236.

4. The Court Must Consider Whether The State Could Have Accomplished Its Objectives Through More Precise Standards.

The Court must consider whether the legitimate state interest could have been protected by a more carefully and narrowly drawn statute which would have given more notice of the prohibited activity. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

In the instant case, defendants were satisfied with the broad power inherent in the vague and undefined Illinois School Code and did not even attempt to draw regulations which advised the students of proscribed conduct. It is instructive to note the comparative precision with which the *Model Penal Code* deals with the subject of disorderly conduct. Disorderly conduct concerns regulatory problems similar to that with which the Illinois School Code attempts to regulate:

> "250.2. Disorderly Conduct.
>
> (1) Offense defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
>
> (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

> (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
>
> "Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

* * * *

Model Penal Code, ALI, Proposed Off. Draft. Sec. 250.2.

CONCLUSION

For the reasons stated, the judgment of the District Court, should be reversed, with instructions to grant relief requested by plaintiffs in their Motion for Interlocutory Relief, and in their Complaint.

Respectfully submitted,

Paul M. Lurie
208 South LaSalle Street
Chicago, Illinois 60604
Attorney for Plaintiffs-Appellants.

Of counsel:
Fohrman and Lurie
208 South LaSalle Street
Chicago, Illinois 60604
332-4611

(Supplement to Scoville Brief)

ARGUMENT

The Trial Court decided this case on pleadings which affirmatively alleged a lack of "commotion or disruption" in connection with plaintiffs' publishing of the journal in question (Complaint, paragraph 10, App. 3). Further, defendants' Resolution of Expulsion attached to plaintiffs' Complaint lacked a finding of "gross misconduct, gross disobedience" or any disruption (App. 24, 25 and 26). To fill this evidentiary void, defendants attempt to create a series of irrebuttable presumptions: plaintiffs' opinions are presumed to be disruptive; and plaintiffs' use of printed words is presumed to be "deliberate" and "disruptive."

In cases involving First Amendment issues, irrebuttable presumptions and subjective apprehensions of distrubance cannot be substituted for evidence. (See Appellants' Brief, page 15 et seq.) Plaintiffs' position is further supported by the case of Tinker v. Des Moines Independent Community School District, 21 L. Ed. 731 (1969), decided after submission of Appellants' Brief. That case held that high school students can only be expelled for the exercise of expression when the record upon which such expulsion is based contains facts upon which school administrators could justify a finding that unless the expression was suppressed, classroom activity would be materially disrupted or substantial disorder would be created. The Tinker trial court, which was affirmed without opinion by the 8th Circuit, had held that courts should give administrators broad discretion and that discipline for expression would be tolerated so long as any disturbance could be reasonably anticipated. The Tinker trial court expressly rejected the standards of Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966) which limited administrators' power of discipline not to "any disturbance" but only to those situations where the expression 'materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.' 258 F. Supp. 971, 973. Under the Burnside view, the school's anticipation of any disturbance was insufficient to justify discipline.

The Supreme Court in Tinker adopted the Burnside view and held that the mere subjective apprehension of disturbance by the school administrators was insufficient to justify expulsion for the exercise of First Amendment rights. The school officials must establish that unless suppressed, the expression will result in material disruption of class work, substantial disorder, or the invasion of the rights of others. 21 L. Ed. 731, 741.

Defendants argue that plaintiffs deliberately proposed violation of "school procedures." There is no evidence in the record of such "deliberateness" nor of such "procedures;" and if there were a question of intention, it would not be appropriately decided on the motion filed by defendants of the Trial Court (App. 31-32). Even assuming plaintiffs' intentions were deliberate, there is no evidence of the required finding of disruptive effect unless the court engages in another irrebuttable presumption. Defendants' argument appears to be based on a premise that the audacity of plaintiffs' statements evidences insubordination and it is this insubordination which justifies findings of "misconduct" and "material disturbance." However, the Supreme Court in Tinker considered deliberateness irrelevant to the issue of disruption. The Court found that the expressions in Tinker were protected even though they were a deliberate violation of a previously announced school regulation: "Petitioners were aware of the regulation that the school authorities adopted banning the arm bands." 21 L. Ed. 731, 736. Also see the discussion in Appellants' Brief on insubordination at page 19.

Defendants' arguments appear to have as an undertone the premise that plaintiffs' "crime" was the challenging of authority and that in the name of training for obedience students can be punished for peaceful exercise of criticism. This view of the necessity of the students' blind obedience to authority has been recently rejected in Breen v. Kahl, U.S.D.C.,

W. Wisc., decided February 20, 1969, reported in 37 LAW WEEK 2506, a case decided after the submission of Appellants' Brief. That case held invalid a regulation forbidding long male hair and ordered a notation of disciplinary action to be expunged from plaintiffs' records. Judge Doyle stated in that case:

> "So far as education of young people in obedience is concerned, it is important for them to appreciate the present vitality of our proud tradition that although we respect government in the exercise of its constitutional powers, we jealously guard our freedoms from its attempts to exercise unconstitutional powers." 37 LW 2057.

Unlike most disciplinary cases which have reached the courts, no regulation was in effect at the time of plaintiffs' expulsion forbidding the conduct for which plaintiffs were ultimately expelled; nor were plaintiffs ever warned that their activity would be cause for expulsion. Defendants contend at page 20 of Appellees' Brief that plaintiffs should have known that they were violating "accepted rules of conduct" and were urging students to violate "accepted procedures";* and they should have known that this activity would have resulted in expulsion.

---

* Defendants urge as another irrebuttable presumption that a tongue-in-cheek urging of the destruction of "propaganda," should be expanded in meaning to include all papers, articles, reports, information sheets and Principal's Reports to Parents. Appellees' Brief, page 13.

In the
United States Court of Appeals
For the Seventh Circuit

No. 17190 September Term, 1969 September Session, 1969

Raymond Scoville, a minor, and Merrill Scoville, as father and next friend; Arthur Breen, a minor, and Jerry Breen, as father and next friend,
Plaintiffs-Appellants,
v.
Board of Education of Joliet Township High School District 204, County of Will, State of Illinois; Arthur L. Bruning, David R. Ross, Howard Johnson and Clayton Wintersteen,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 1, 1970

Before Swygert, *Chief Judge,* Castle, *Senior Circuit Judge,* Kiley, Fairchild, Cummings and Kerner, *Circuit Judges, en banc.*

Kiley, *Circuit Judge.* The plaintiffs, minors, were expelled from high school after writing, off the school premises, a publication which was distributed in school and which contained, among other things, material critical of school policies and authorities. This civil rights action was brought for declaratory judgment, injunctive relief, and damages,[1] alleging violation of First and Fourteenth Amendment rights, as well as an unconstitutional application of an Illinois statute. The district court dismissed the suit for failure to state a claim upon which relief could be granted. A panel of this court, in an opinion (one judge dissenting) issued September 25, 1969, affirmed the district court's judgment dismissing the complaint. Subsequently, this court granted plaintiffs' petition for rehearing *en banc*. We now reverse the district court's judgment and remand for further proceedings.

The plaintiffs are Raymond Scoville and Arthur Breen, students at Joliet Central High School, one of three high schools administered by the defendant Board of Education. Scoville was editor and publisher, and Breen senior editor, of the publication "Grass High." They wrote the pertinent material. "Grass High" is a publication of fourteen pages containing poetry, essays, movie and record reviews, and a critical editorial. Sixty copies were distributed to faculty and students at a price of fifteen cents per copy.

On January 18, 1968, three days after "Grass High" was sold in the school, the dean advised plaintiffs that they could not take their fall semester examinations. Four days thereafter plaintiffs were suspended for a period of five days. Nine days after that Scoville was removed as editor of the school paper, and both he and Breen were deprived of further participation in school debating activities.

The dean then sent a report to the superintendent of the high schools with a recommendation of expulsion for the remainder of the school year. The superintendent wrote the parents of plaintiffs that he would present the report, together with the recommendation, to the Board of Education at its next meeting. He invited the parents to be present. Scoville's mother wrote a letter to the Board (plaintiffs' Exhibit 2, appended to the complaint) expressing plaintiffs' sorrow for the trouble they ~~students~~ had caused, stating that they had learned a lesson, that they were worried and upset about possible interruption in their education and that the parents thought the boys had already been adequately punished. Neither plaintiffs nor their parents attended the Board meeting. The Board expelled plaintiffs from the day classes for the second semester, by virtue of the Board's authority under ILL. REV. STAT. Ch. 122, Sec. 10-22.6 (1967), upon a determination that they were guilty of "gross disobedience [and] misconduct." The Board permitted them to attend, on a probationary basis, a day class in physics, and night school at Joliet Central. The suit before us followed.

---

[1] The period of expulsion has ended and plaintiffs were readmitted to Joliet Central High School as seniors for the school year 1969-70. This fact renders moot the question of injunctive relief against the Board of Education's order. Remaining are the questions of declaratory judgment, injunctive relief with respect to restraining defendants from sending information of the expulsion to colleges and prospective employers of plaintiffs, and with respect to expunging the expulsions from the school record.

1968-1969

Upon defendants' motion to dismiss, the district court decided that the complaint, on its face, alleged facts which "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures," especially because the publication was directed to an immature audience. In other words, the court implicitly applied the clear and present danger test, finding that the distribution constituted a direct and substantial threat to the effective operation of the high school. At no time, either before the Board of Education or in the district court, was the expulsion of the plaintiffs justified on grounds other than the objectionable content of the publication. The Board has not objected to the place, time or manner of distribution. The court found and it is not disputed that plaintiffs' conduct did not cause any commotion or disruption of classes.

No charge was made that the publication was libelous, and the district court felt it unnecessary to consider whether the language in "Grass High" labeled as "inappropriate and indecent" by the Board could be suppressed as obscene.[2] The court thought that the interest in maintaining its school system outweighed the private interest of the plaintiffs in writing and publishing "Grass High." The basis of the court's decision was an editorial entitled "My Reply" (a copy of which is appended to this opinion) which—after criticizing the school's pamphlet, "Bits of Steel," addressed to parents—urged the students not to accept "in the future," for delivery to parents, any "propaganda" issued by the school, and to destroy it if accepted.

---

[2] The Board found sufficient to justify expulsion that the action of plaintiffs

(1) constitutes a public use of inappropriate and indecent language, (2) constitutes a violation of established rules of said school district, (3) constitutes a disregard of and contempt for the

I

Plaintiffs contend that the expulsion order violated their First and Fourteenth Amendment freedoms. The same cases are cited by plaintiffs and defendants in support of their arguments on this contention. The authoritative decision, pertinent to the important[3] issue before us, is *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).[4] *Tinker* is a high school "arm band" case, but its rule is admittedly dispositive of the case before us.[5]

---

[2] (Cont.)

> authorities charged with the administration of said Central Campus and said school district, (4) encourages the disregard and disobedience of orders promulgated by the duly constituted authorities of said Central Campus and said school district, (5) involves other students as parties to the preparation and distribution of the aforesaid writing who were in fact not parties thereto.

Board resolution, plaintiffs' Exhibit 3, appended to the complaint.

There is a risk with respect to (4) above. "But our Constitution says we must take this risk." *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969).

The Board relied upon an unwritten policy which was presumably applied ex post facto to the plaintiffs.

[3] "High school underground newspapers are spreading like wildfire in the Chicago area." *High School Students Are Rushing into Print—and Court*, Nation's Schools, Jan. 1969, p. 30. See also Nahmod, *Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools*, 51 Chicago Bar Record 144 (Dec. 1969).

[4] The Supreme Court decision in *Tinker* was not filed until after the district court decided the case before us and after plaintiffs' original brief was filed. *Tinker* was cited and discussed in defendants' brief and in plaintiffs' reply brief.

[5] The closest case factually which gives support to plaintiffs is the university publication case of *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967)—also decided before *Tinker*. The fact that it involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities.

We think the district court should not have been too concerned over the immaturity of the student readers of "Grass High." Professor Charles Alan Wright has noted, however: "It is likely that the tolerable limit for student expression in high school should be narrower than at college or university level." Wright, *The Constitution Has Come to the Campus*, 22 VAND. L. REV. 1052, 1053 (1969).

The *Tinker* rule narrows the question before us to whether the writing of "Grass High" and its sale in school to sixty students and faculty members could "reasonably have led [the Board] to *forecast* substantial disruption of or material interference with school activities . . . or intru[sion] into the lives of others."[6] *Tinker* v. *Des Moines School District*, 393 U.S. at 514. (Emphasis added.) We hold that the district court erred in deciding that the complaint "on its face" disclosed a clear and present danger justifying defendants' "forecast" of the harmful consequences referred to in the *Tinker* rule.

Tinker announces the principles which underlie our holding: High school students are persons entitled to First and Fourteenth Amendment protections. States and school officials have "comprehensive authority" to prescribe and control conduct in the schools through reasonable rules consistent with fundamental constitutional safeguards. Where rules infringe upon freedom of expression, the school officials have the burden of showing justification. See also *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d 749 (5th Cir. 1966); *Soglin v. Kaufman*, No. 17427 (7th Cir. Oct. 24, 1969); *Breen v. Kahl*, Nos. 17552, 17553 (7th Cir. Dec. 3, 1969); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967); *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968). There is no dispute here about the applicable principles or decisional rules.

Plaintiffs' freedom of expression was infringed by the Board's action, and defendants had the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity. No reasonable inference of such a showing can be drawn from the complaint which merely alleges the facts recited in the beginning of this opinion. The criticism of the defendants' disciplinary policies and the mere publication of that criticism to sixty students and faculty members leaves no room for reasonable inference justifying the Board's action. While recognizing the need of effective discipline[7] in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students imaginations, intellects and wills be unduly stifled or chilled. Schools are increasingly accepting student criticism as a worthwhile influence in school administration.[8]

---

[6] This "forecast" rule is an extension of the "substantial disruption or material interference" rule applied in the leading decision of *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), in favor of students, and in *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d 749 (5th Cir. 1966), against students' conduct.

Absent an affirmative showing by the defendants, the district court, faced with the motion to dismiss, inferred from the admitted facts in plaintiffs' complaint and the presented exhibits that the Board action was justified. However, the district court had no factual basis for, and made no meaningful application of, the proper rule of balancing the private interests of plaintiffs' free expression against the state's interest in furthering the public school system. *Burnside v. Byars*, 363 F.2d at 748. No evidence was taken, for example, to show whether the classroom sales were approved by the teachers, as alleged; of the number of students in the school; of the ages of those to whom "Grass High" was sold; of what the impact was on those who bought "Grass High"; or of the range of modern reading material available to or required of the students in the school library. That plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance per se under the *Tinker* test.

The "Grass High" editorial imputing a "sick mind" to the dean reflects a disrespectful and tasteless attitude toward authority. Yet does that imputation to sixty students and faculty members, without more, justify a "forecast" of substantial disruption or material interference with the school policies or invade the rights of others? We think not. The reference undoubtedly offended and displeased the dean. But mere "expression of [the students'] feelings with which [school officials] do not wish to contend" (*Tinker v. Des Moines School District*, 393 U.S. at 511; *Burnside v. Byars*, 363 F.2d at 749) is not the showing required by the *Tinker* test to justify expulsion.

---

[7] Ill-considered suppression carries its own dangers. For example, in *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d at 751, it is said that three students wore the challenged freedom buttons on Friday. They were taken to the principal who ordered the buttons removed. The three refused to do so and were suspended. On Monday 150 students wore the buttons.

[8] The Harvard Law Review states "[R]esponsible student criticism of university officials is socially valuable since in many instances the students are peculiarly expert in campus issues and possess a unique perspective on matters of school policy." *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1130 (1968). Prudent criticism by seventeen-year-old high school juniors may also have value.

Finally, there is the "Grass High" random statement, "Oral sex may prevent tooth decay." This attempt to amuse comes as a shock to an older generation. But today's students in high school are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best selling modern literature. A hearing might even disclose that high school libraries contain literature which would lead students to believe the statement made in "Grass High" was unobjectionable.[*]

We believe the discussion above makes it clear, on the basis of the admitted facts and exhibits, that the Board could not have reasonably forecast that the publication and distribution of this paper to the students would substantially disrupt or materially interfere with school procedures.

II

The sole authority for the Board's action is ILL. REV. STAT. Ch. 122, Sec. 10-22.6 (1967), which gives the School Board the power "to expel pupils guilty of gross disobedience or misconduct." In view of our conclusion that the complaint "on its face" discloses an unjustified invasion of plaintiffs' First and Fourteenth Amendment rights, it follows that we agree with plaintiffs that the Board applied the Illinois statute in an unconstitutional manner.

We conclude that absent an evidentiary showing, and an appropriate balancing of the evidence by the district court to determine whether the Board was justified in a "forecast" of the disruption and interference, as required under *Tinker*, plaintiffs are entitled to the declaratory judgment, injunctive and damage relief sought.

The cause is remanded for further proceedings.

REVERSED AND REMANDED.

---

[*] See Nahmod, *Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools*, 51 Chicago Bar Record, 144, 152 n.4 (Dec. 1969).

APPENDIX

MY REPLY

Recently, we students at Joliet Central were subjected to a pamphlet called "Bits Of Steel." This occurrence took place a few weeks before the Christmas vacation. The reason why I have not expressed my opinions on this pamphlet before now is simple: being familiar with the J-HI Journal at Central, I knew that they would not print my views on the subject.

In my critique of this pamphlet I shall try to follow the same order in which the articles were presented.

The pamphlet started with a message from the principal, David Ross. This is logical because the entire pamphlet is supposed to be "The Principal's Report to Parents." In this article Ross states why the pamphlet was put out and the purpose it is supposed to accomplish, namely, the improvement of communication between parents and administration. He has to be kidding. Surely, he realizes that a great majority of these pamphlets are thrown away by the students, and in this case that is how it should have been. I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes.

The second article told about the Human Relations committee which we have here at Central. It told why the committee was assembled and what its purpose is. It also listed the members of the committee who attend school here at Central. All-in-all this was probably the best article in the whole pamphlet, but never fear the administration defeated its own purpose in the next article which was a racial breakdown of the Central campus. As far as I could see this article served no practical purpose. By any chance did the administration feel that such a breakdown would improve racial relations? I think not. This article had such statements as: Spanish American students were included with the white students. Well, wasn't that nice of the administration. In other words, the only difference noted was whether the student was white or Negro.

This was followed by an article called "Did you Know?" This was, supposedly, to inform the parents of certain activities. Intertwined throughout it were numerous rules that the parents were to see their children obeyed. Quite ridiculous.

Next came an article on attendance. There's not much I can say about this one. It simply told the haggered parents the utterly idiotic and asinine procedure that they must go through to assure that their children will be excused for their absences.

Question from the parents was the next in the line of articles. This consisted of a set of three questions written by the administration and then answered by the administration. The first question was designed to inform the reader about the background of the new superintendent. The second was about the paperbacks which were placed in the dean's office. They state that the books were put there "so that your sons and daughters may read while they wait. The hope is that no moment for learning will be lost." Boy, this is a laugh. Our whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting time. The last question concerned the Wednesday Que-ins. It was followed by a quote: "Sometimes we, parents and schoolmen must seem cruel in order to be kind to the children placed in our care." Do you think that the administration is trying to tell us something about the true purpose of the Wednesday Que-ins?

The next gem we came across was from our beloved senior dean. Our senior dean seems to feel that the only duty of a dean or parent is to be the administrator of some type of punishment. A dean should help or try to understand a student instead of merely punishing him. Our senior dean makes several interesting statements such as, "Proper attitudes must be part of our lives and the lives of our children." I believe that a person should be allowed to mold his own attitudes toward life, as long as they are not radically anti-social, without extensive interference from persons on the outside, especially these who are unqualified in such fields. Another interesting statement that he makes is "Therefore let us not cheat our children, our precious gifts from God, by neglecting to discipline them!" It is my opinion that a statement such as this is the product of a sick mind. Our senior dean because of his position of authority over a large group of young adults poses a threat to our community. Should a mind whose only thought revolves around an act of discipline be allowed to exert influence over the young minds of our community? I think not. I would urge the Board of Education to request that this dean amend his thinking or resign. The man in the dean's position must be qualified to the extent that his concern is to help the students rather than discipline or punish them.

This pamphlet also contained an article from the freshman dean. I should like to say that Dean Engers, in his article, shows a great deal of promise. He appears to be genuinely interested in the problems of the students entrusted to him. All I can say to him is to keep up the good work.

The last thing of any interest in the pamphlet was about the despicable and disgusting detention policy at Central. I think most students feel the same way as I about this policy. Therefore I will not even go into it.

In the whole pamphlet I could see only one really bright side. We were not subjected to an article written by Mr. Diekelman.

Senior Editor
Grass High

No. 17190

Castle, *Senior Circuit Judge*, dissenting. I find myself constrained to disagree with the majority's conclusion that *Tinker* v. *Des Moines School District*, 393 U.S. 503, and the other cases relied upon, dictate that in the circumstances of this particular case an evidentiary hearing was a prerequisite to the District Court's implicit finding and conclusion that the disciplinary action taken by the school board was justified. Here, there was admitted action by the minor plaintiffs, through the medium of their publication "Grass High", calling upon their fellow-students to flaunt the school's administrative procedure by destroying, rather than delivering to their parents, materials delivered to the students for the latter purpose.

I perceive no occasion here for the court to hear evidence bearing on the actual or likely success or effect of such advocacy as a prerequisite to a "balancing of the private interests" of these adolescent plaintiffs' "free expression" against the state's interest in conducting an efficient system of public schools. In my view, plaintiffs' advocacy of disregard of the school's procedure carried with it an inherent threat to the effective operation of a method the school authorities had a right to utilize for the purpose of communicating with the parents of students.

I would affirm the judgment of the District Court.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3747—The Scheffer Press, Inc., Chicago, Illinois—4-1-70—200

Joliet High School Asks for Review of Scoville Case

BY PAMELA ZEKMAN

Opposing parties in a two-year-old controversy involving the rights of high school students agree on only one thing—there is a need for clear rules telling high school officials how far their authority to operate schools can extend without infringing on students' constitutional rights.

For that reason the Joliet Township High school board has voted to authorize Atty. Richard Buck to petition the United States Supreme court to review the recent 5-to-1 federal Court of Appeals decision against them.

The decision held that school officials should not have expelled two students, Raymond Scoville and Arthur Breen, in 1968 for distributing a literary magazine, "Grass High," at Joliet Central High school if they could not "reasonably forecast" that a substantial disruption of school procedures would result.

Have Since Graduated

Both students were expelled for one semester, readmitted after they initiated court action, and have since graduated. Scoville, 925 Oakland av., Joliet, dropped out of the University of Chicago after his first quarter there because he "didn't like school in general." He is looking for a job in Joliet but is "having difficulty because I have long hair I guess."

Breen, 655 Ross st., Joliet, is working for an aluminum processing company.

The magazine the two published contained poetry, essays, and an editorial critical of school personnel that urged students to either refuse to accept or destroy upon acceptance all "propaganda" published by the school administration. Since their graduation, the two youths have periodically published other editions. The last one was seen at the school in February.

The appeals court relied on a United States Supreme Court decision handed down Feb. 24, 1969, [Tinker v. Des Moines Independent Community School district] in which the court upheld the right of high school students to wear black armbands on school facilities.

Apply "Tinker Rule"

In the Scoville case, the court of appeals applied the "Tinker rule" which they said narrows the issue to whether distribution of "Grass High" could reasonably have led school officials to "forecast a substantial disruption of, or material interference with school activities . . . or intrusion into the lives of others."

"I would challenge anyone to define what is a real and present danger of disruption," Dr. Arthur Bruning, Joliet school superintendent, said. "If someone distributes literature that could precipitate a violent confrontation with students, should the school wait until the confrontation occurs before they take action?

"We feel the decision goes far beyond the expulsion of these two students and far beyond Joliet school," Bruning said. "Therefore we feel it [the case] should be carried to its conclusion so that the conduct of all school officials can be clarified. This poses a threat to the conduct of schools and there is a great deal of concern."

Mail Opposes Ruling

The superintendent reported the school has received heavy mail opposing the court ruling and several offers from various organizations and other school districts to join in the petition to the Supreme court. He said they plan to solicit assistance in their endeavor.

Paul Lurie, attorney for the American Civil Liberties Union [A. C. L. U.], who represented the students in the suit, said, "We're tickled pink that the district has voted to appeal the decision. We can't lose. I would be shocked if the Supreme court disagreed with this decision."

Jay Miller, head of the Illinois chapter of the A. C. L. U., said he felt the Scoville decision was "clear, well reasoned, and well laid out. It is almost inconceivable that the United States Supreme court won't agree with it."

While Dr. Bruning looks to the Supreme court to clarify the position of school officials, Miller feels the courts have done their job and that it is now time for boards of education to advise their principals on current and probable future court decisions.

The A. C .L. U. has encouraged school administrators to embark on such a program. They feel such action is needed to inform school officials and to give to students, who might otherwise risk expulsion, clear notice of what can and cannot be done in the area of protest activities at schools.

II. PERSONAL RIGHTS

AMERICAN CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, New York 10010

April, 1970

MEMORANDUM

To: Affiliates

From: Legal Department

Re: Class Actions in Civil Liberties Cases

I. Introduction

We have become increasingly aware that our litigational efforts to defend and advance civil liberties are often hampered by the difficulties of enforcing a new principle which we have secured in a particular lawsuit. We succeed in establishing a precedent which is then ignored by similarly situated officials who were not parties to the original suit.

Thus, for example, an affiliate takes a case involving a high school student suspended for violating a rule or order prescribing "reasonable" appearance. The litigation is successful, but it only involved one school principal or district. While the favorable decision is theoretically stare decisis within the judicial district, it is a binding judgment only as between the parties to it. When the next student is disciplined for his appearance even by the same school official (though more probably by a different one in another school or district), we must initiate new litigation to secure the civil liberties of the second student.[*]

This memorandum urges utilization of the class action device, provided for in Rule 23 of the Federal Rules of Civil Procedure, as a method of insuring that civil liberties victories will not be hollow ones.

---

[*] For example, the Illinois affiliate won a long-hair suit, then discovered that despite the favorable decision other schools continued to discipline students until a suit was brought against their school. Minutes of the November 6, 1969 Meeting, Board of Directors, Illinois Division, ACLU.

The memorandum urges increased use of the plaintiff's (or "unilateral") class action, and combined use of the defendant's class action in certain kinds of situations. (Though the memorandum focuses on hair and dress, the class action device, of course, has wider application.)

The civil rights movement has made effective use of the traditional plaintiff's class action as, for example, in bringing a class suit on behalf of all black school children in a particular area against the official or body responsible for that area. In such a case, securing a judgment on behalf of the class against certain defendants provides effective relief since if the defendant refuses to comply with the decision, any member of the class, though not a named party, can seek summary relief against the defendant without having to institute a de novo lawsuit.* Thus, the plaintiff's class action device can continue to be fruitfully utilized when the conduct complained of stems basically from a single official source.

Often, however, civil liberties violations come in the context of a widespread practice by many coordinated, independent officials. Long-hair cases are one example. Another involved racial segregation in all Alabama prison facilities, where a "bilateral" class action (that is, plaintiffs suing as a class against certain prison officials as representatives of all such officials in the state) was very successful.

Recent changes in Rule 23 suggest that if a class action is to be utilized, it may be advantageous, where the facts warrant, to bring it as a bilateral class suit.* The new Rule, however, provides that all members will be bound and, thus, there is a greater risk in using the plaintiff class action device. Consequently, once you decide to use the plaintiffs' class action, there is not an appreciably greater risk to making it bilateral where appropriate. Since all members of the class will be bound anyway if the plaintiffs' class action fails, suing the defendants as a class will make enforcement much easier if the plaintiff wins; each member of the defendant's class (e.g., all principals, all jailers) will be bound by the judgment. In other words, losing a bilateral class action is not much more disabling than losing a plaintiff's suit; winning a bilateral suit is much more advantageous.

---

* The ACLU of Oregon recently filed suit on behalf of all blacks in Portland complaining of a systematic course of wrongful conduct by the police. The defendants were the Mayor, Chief of Police and several "John Doe" officers. Should the plaintiffs prevail, any member of the class who is thereafter abused can bring on a show cause order to hold the offending officer in contempt. Also, in Smith v. Hill, 285 F.Supp. 556 (E.D. N. C. 1968) a successful class action was brought on behalf of all Negroes, unemployed, and persons within the definition of a local vagrancy ordinance to invalidate that ordinance. The court did so, and it specified that the defendants were enjoined from enforcing the ordinance against any member of the plaintiff's class.

Of course, there are numerous factors to be considered in determining whether to bring either kind of class action. The risks involved in losing must be considered, since all members of the plaintiff's class are bound; new suits on the same issue are rendered improbable. Also, one must consider the added procedural difficulties in managing such a suit. On the other hand, the more likely a victory on the merits, the more beneficial a class action. Moreover, a class action can avoid mootness problems present in a non-class suit.

What follows is an analysis of the key requirements of Rule 23, set in the context of a long-hair suit.

II. An Analysis of Rule 23

Class actions in federal suits are controlled by the detailed provisions of Rule 23, F.R. Civ.P. The Rule is conceptually structured to apply to the plaintiff's class action. To bring a bilateral class action requires a showing of all the relevant requirements as to both plaintiff and defendant, see, e.g., Technograph Printed Circuits, Ltd. v. Methode Electronics, 285 F.Supp. 714 (N.D. Ill. 1968).

---

* The "spurious" class action device, whereby a non-party member of the class could avail himself of a judgment in favor of his class even though he would not have been bound by an unfavorable judgment, was eliminated.

Designation of Classes

Plaintiff's Class - In a long-hair or dress code case, the most useful general class is all students affected by the regulation or rule, or by the pattern of discipline, rather than smaller sub-classes, such as of all students who had been disciplined for their long-hair or short skirts. The fact that all male students might not want to have long hair cannot defeat the class action. See Snyder v. Board of Trustees, 286 F.Supp. 927 (N.D. Ill. 1968); but cf. Ward v. Luttrell, 292 F.Supp. 165 (E.D. La. 1968) (suit on behalf of all women employees, challenging state law regulating hours of employment; class action disallowed).

Defendant's Class - Where there is a city-wide or district-wide regulation flatly prohibiting long-hair or sideburns, then the prime defendant would probably be the superintendent or board of education which promulgated the rule. Since the prohibition stems from a single source, a successful plaintiff class action would give effective relief. On the other hand, the more power which is vested in local principals, the more fruitful it would be to sue certain principals as class representatives. If the Court allows such a bilateral class action, and the plaintiffs win, then there will be a judgment enforceable against all in the area (county, city, state).

In either situation, the actual parties must be representative of the class whose interest they assert, and that class must be capable of definition with some precision.

It must be emphasized that where a bilateral action is attempted, you must allege that the elements of the rule apply to both sides.

Section (a) - General Requirements

This section sets forth the mandatory prerequisites for allowing a class action.

(1) The class must be so numerous that the joinder of all members is impracticable.

On the plaintiff's side, this requirement should be simple to meet. Presumably there will be thousands of students subject to hair regulations. Whether the defendant's class is sufficiently large depends on the factual pattern in your area. There may be so few principals in the district that joinder would not be impracticable. For example, one decision refused to allow a class action where only six students had been denied procedural due process, see Jones v. State Board of Education of Tennessee, 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 38 U.S. Law Week 3317 (1969). Thus, when dealing with a handful of schools, a plaintiff's class action alone, with all principals as named defendants would be the easiest and most effective strategy.

(2) There are questions of law and fact common to the class.

Presumably most high schools in any given area will have regulations either adopted independently or mandated from a central source requiring that hair be of a "reasonable" length, prohibiting beards and mustaches, and regulating the length of sideburns. The constitutionality of such regulations would provide common First Amendment and privacy questions.* The same would probably be true of the defendant's class. That there might ultimately be differing factual questions as to each member of the class cannot defeat the class action. See Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968) (a suit by a few small shareholders complaining of stock transactions by corporate officials); Washington v. Lee, supra.

---

* If a sizeable number of students had actually been disciplined, they might constitute a sub-class which could raise additional procedural due process issues.

(3) The claims or defenses of the representative parties must be typical of the claims or defenses of the class.

This requirement would be met since the representative plaintiffs would be asserting, for example, that the First Amendment guarantees of freedom of expression allow all students to wear their hair however they choose without fear of punishment. The representative defendants presumably would assert their common need for discipline and an uninterrupted educational process and argue that long hair undermines these objectives.

(4) The representative parties will fairly and adequately protect the interests of the class.

This provision aims at preventing collusive suits. The adequacy of representation by the plaintiffs can be demonstrated by rehearsing ACLU credentials in advancing the First Amendment rights of all students and setting forth the background of the attorneys who represent the plaintiffs and any other organizations which will be supporting the litigation.

Section (b) - Additional Alternative Tests

In addition to meeting all of the requirements of section (a) of the Rule, the potential class action must additionally come within at least one of the alternative provisions of section (b).

Section (b) (1) (A) allows a class action where the prosecution of separate actions by members of the class would create the risk of inconsistent adjudications establishing incompatible standards of conduct for the party opposing the class. Section (b) (1) (B) allows a class action where separate adjudications as to individual members of the class would, as a practical matter, be dispositive of the interests of the other members of the class. Subsection (A) might be available in the situation where there is a no-hair rule applicable throughout a school district encompassing perhaps two dozen high schools and presided over by a single superintendent, or where a series of independent districts have a substantially similar rule or prohibition. Subsection (B) arguably refers to the stare decisis effects which the decision would have, i.e., a decision regarding the constitutionality of long-hair regulations would, in practical terms, because of its precedential impact in the judicial district, effectively resolve the issue as to all students there, and thus the suit should be allowed to proceed as a class action. See Snyder v. Board of Trustees of the University of Illinois, 286 F.Supp. 927 (N. D. Ill. 1968) (class action allowed on behalf of all university students to void a ban on subversive speakers). Section (b) (1) was the basis for a bilateral class action in Wilson v. Kelley, 294 F.Supp. 1005 (N.D. Ga. 1968), challenging racial segregation in Georgia prison and jail facilities. The plaintiffs sued several state-wide officials in their official capacities, and three sheriffs and wardens as a class representing all wardens and jailers.

Section (b) (2) allows a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate with respect to the entire class. This sub-division is uniquely applicable to long-hair suits. Indeed, the Advisory Committee on the Federal Rules notes that civil rights suits are especially illustrative of 23 (b) (2), and that the action or inaction referred to is deemed directed at the class even though it has taken effect or been threatened only with regard to a few members of the class, provided that the action is based on grounds generally applicable to the class. Thus, for example, the expulsion of one student for long hair and the threat to act similarly with regard to any other student who lets his hair grow would be sufficient to invoke this alternative condition. This provision is also an available basis for the bilateral class action where the factual situation warrants it.

Subpart (3), the final provision of section (b), is a catch-all allowing a class action when, although none of the other provisions of section (b) have been met, nevertheless the common questions predominate over issues pertaining to individuals and the class action device is superior to any other method of resolution. This is a restatement of the previous Rule and is more discretionary with the court. See Eisen v. Carlisle and Jacqueline, 391 F.2d 555 (2d Cir. 1968). Demonstrating that common questions predominate should not be too difficult.

The other element requires a showing that the class action device is superior to any possible alternatives for protecting rights and resolving the dispute. In this regard, courts commonly consider four possible alternatives and require counsel proposing a class action to demonstrate their ineffectiveness. We think it can be argued that three of the alternatives, namely joinder, intervention and consolidation, are ineffective to protect students' First Amendment rights. All three presuppose that the individual student not only knows that his rights have been violated but can also afford counsel to assert them.

While students actually expelled would have a sufficient stake to want to take action, others might not know how to proceed. Moreover, as to all other students a good argument can be made that they would probably surrender to authority by cutting their hair or not letting it grow, rather than incur the expense and burdens which a lawsuit might entail. Since the primary purpose of allowing a class suit is to facilitate the assertion of rights on behalf of those who for reasons of economics or otherwise would have no other means of redress, it is most appropriate here.

The fourth alternative to preclude a class suit is the availability of the test case device. Presumably the defendants would argue that an individual test case on the issue would be sufficient and would not involve the procedural difficulties which a class action imposes on court and counsel. The answer is that even if one long-haired plaintiff prevails and establishes the general principle, other students might still have to resort to the expense and inconvenience of litigation to enforce the newly-created right as against their particular school official who might choose to disregard the judicial precedent. Experiences with school boards in ignoring judicial decisions concerning desegregation and school prayers can hardly make one sanguine about the prospects of compliance with judgments that technically do not bind them. Indeed, the inadequacy of the test case device was a substantial motivation for this memorandum.

Section (c) - Court Approval and Notice

At some point soon after the complaint is filed, the Court must specifically determine whether the suit can be maintained as a class action, and if so, what provisions for notice are to be made. The section also deals with the effect which the ultimate judgment will have. The notice and effect provisions are interdependent and in addition vary with the kind of class action the court has determined the case to be.

Thus, in a (b) (3) action, the more discretionary form, the court "shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23 (c) (2). However, the judgment in such an action is effective only against those members of the class to whom the notice was provided (and who did not request exclusion). On the other hand, in a (b) (1) or (b) (2) action, there are no specific notice requirements and the judgment describes and binds "those whom the court finds to be members of the class." Section (d), however, empowers the court to determine the manner of notice.

Courts have frequently been concerned with the due process problems which may be presented by inadequate notice. See Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968). However, in a non-monetary civil liberties suit to establish or enforce constitutional rights, notice is less of a problem and courts have dispensed with the requirement of actual notice by reasoning that the attendant publicity of the lawsuit provides adequate notice to the members of the plaintiff's class. See, e.g., Denny v. Health and Social Services Board, 285 F.Supp. 526 (E. D. Wisc. 1968); Snyder v. Board of Trustees, supra. As to the presumably smaller defendant class in a bilateral action, actual notice can be provided. See, e.g., Wilson v. Kelley, supra.

The above discussion has attempted to outline the key features governing the institution of a class action. Of course, where specific problems arise the Rule and annotations should be consulted. A sample class action complaint in a hypothetical long-hair suit follows. A collection of citations to all known hair and dress cases is attached at the end of the complaint. Briefs on the merits are available in the National Legal Department.

SAMPLE COMPLAINT

UNITED STATES DISTRICT COURT

_______ District of _______

_________ Division

- X

JOHN DOE, JR., a Minor, by his Father and Next Friend, JOHN DOE: RICHARD ROE, JR., a Minor, by his Father and Next Friend, Richard Roe; JOSEPH JOE, JR., a Minor, by his Father and Next Friend, Joseph Joe, on their behalf and on behalf of all those similarly situated,

Plaintiffs,

vs.

THOMAS JONES, Individually and as State Commissioner of Public Education; WILLIAM BROWN, as Superintendent of District Number One Public Schools; and on behalf of all other District Superintendents similarly situated; JAMES SMITH, as Principal of Tom Paine High School, and on behalf of all other Principals similarly situated,

Defendents.

- X

COMPLAINT

Jurisdiction

1. This is a civil action seeking declarative and injunctive relief to enjoin the deprivation, under color of state law, of plaintiffs' rights, privileges, and immunities under the United States Constitution. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1343(3) and (4), 2201, and 2202; Title 42, U.S.C. Sections 1981, 1983, and 1975; and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

2. This action seeks a declaratory judgment invalidating as repugnant to the Constitution a directive promulgated by the defendant State Commissioner of Public Education authorizing District Superintendents, such as Defendant Brown, to adopt regulations governing the appearnace of high schools students within their respective Districts, and the regulations so adopted by Defendant Brown; and an unjunction to restrain the enforcement, operation and execution of such regulations by restraining Defendant Smith and other High School Principals from suspending or expelling the plaintiffs or others similarly situated for violation of said regulations on the grounds that such regulations are unconstitutional under the First and Fourth Amendments.

Parties

3. Plaintiff John Doe, Jr. is a citizen of the United States and of the State of __________. Until on or about ________, 1970 he was a student in good standing at Tom Paine High School. Following that date he was expelled from school. He resides at __________________________.

4. Plaintiff Richard Roe, Jr. is a citizen of the United States and of the State of ____________. For the period from _________ to _________ he was suspended from attendance at Tom Paine High School and from all school activities. He is currently a student in good standing at Paine High School. He resides at ________________________.

5. Plaintiff Joseph Joe, Jr. is a citizen of the United States and of the State of ___________. He is currently a student in good standing at Tom Paine High School. He wishes to wear his hair fashionable long, so that it falls over his ears and the collar of his shirt. He has been deterred from doing so by the existence of the regulations propounded by District Superintendent Brown and their actual and threatened enforcement

by Defendant Smith. Plaintiff resides at ________________________.

6. Defendant Thomas Jones, upon information and belief a citizen of the United States and of the State of ______________, is State Commissioner of Public Education. As such he is authorized by Section 13 of the State Education Law to grant authority to District Superintendents to formulate rules of conduct for all high school students within their districts.

7. Defendant William Brown, on information and belief a citizen of the United States and of the State of ___________, is superintendent of District Number One Public Schools. As such, he is authorized to formulate regulations governing the appearance, conduct and discipline of all public school students within the district. He also has the power to review all expulsions and suspensions of high school students.

8. Defendant James Smith, on information and belief a citizen of the United States and of the State of _____________, is Principal of Tom Paine High School. As such, he is authorized to implement and execute the regulations promulgated by Defendant Brown governing students' appearance and conduct. In his official capacity, he was responsible for the expulsion of plaintiff Doe, the suspension of plaintiff Roe, and the threatened suspension of plaintiff Joe.

Class Action

9. Plaintiffs bring this action on their own behalf and on the behalf of other individuals similarly situated, because the class of students affected by the regulations on appearance promulgated by all ten District Superintendents and at issue herein is so numerous that joinder of all members is impracticable and questions of fact and law exist in common to the class. The constitutional claims of the plaintiffs are typical of the claims of the class, the relief sought against the named representative

58

defendants is typical of the relief sought against all superintendents and principals, and the named defendants can adequately protect the interests of their class. The representative parties will fairly and adequately protect the interest of all high school students subjected to the regulation. The prosecution of separate actions by individual students would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant classes.

10. The named defendants as well as the classes they represent have acted on grounds generally applicable to the plaintiffs' class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class. There are questions of law and fact common to the members of both classes that predominate over questions affecting individual members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Facts

11. On September 2, 1969 the defendant JONES, in his capacity as State Commissioner of Public Education and acting pursuant to the power conferred upon him by Section 13 of the State Education Law, promulgated the following directive:

> "Because of the frequent disturbances which were caused throughout the state during the 1968-69 academic year by the dress and appearance of certain students, the Superintendent of each School District within the State is hereby authorized to adopt regulations governing the appropriate manner of dress and appearance of all students within each District and the proper method of sanction against those students who violate such regulations."

12. Pursuant to this state-wide directive, on September 15, 1969 defendant BROWN issued the following regulation applicable to all male students within District Number One:

> "Boys' hair should be worn reasonably short and traditional in style. It should not hang over the eyes or over the ears. It should be tapered in the back. Sideburns should not be below the middle of the ears. Students shall not wear beards or mustaches.
>
> Any student who in the opinion of his principal has violated this rule shall be immediately suspended from attendance until the student satisfactorily complies with the rule. Any student who fails to comply for a period of more than two weeks shall automatically be expelled for the duration of the academic year."

13. This regulation both in its substantive definition and procedural aspects, is substantially similar to regulations adopted by each of the nine other District Superintendents in the class represented by defendant BROWN.

14. Defendant SMITH has enforced the District One regulation by expelling, suspending and threatening with suspension the male students in Tom Paine High School. His official actions in this regard reflect a pattern of enforcement by the high school principals similarly situated in District One and in the State.

15. On or about September 16, 1969 Plaintiff DOE, Jr. was informed by Defendant SMITH that the length of plaintiff DOE's hair was in excess of that allowed by the District One regulations in that it was not "traditional." When Plaintiff DOE refused to have his hair cut, he was immediately suspended by Defendant SMITH and told he could return to school when his hair was "acceptable" to Defendant SMITH. Plaintiff DOE refused to alter his hair style and on October 1, 1969 was expelled from Tom Paine High School in accordance with the two-week provision of the District One regulation.

16. Plaintiff DOE desires to return to Tom Paine High School. His continued expulsion jeopardizes the possibility of his matriculation at a college in the fall of 1970. He believes that he has a right to determine for himself the length at which he will wear his hair and that the length of a person's hair is not the proper determination of Defendants SMITH, BROWN or JONES.

17. On or about September 16, 1969 Plaintiff ROE, Jr. arrived at Tom Paine High School wearing a neatly-trimmed mustache. He was informed by Defendant SMITH that the mustache constituted a violation of the District One Regulation and ordered Plaintiff to go home and shave. Plaintiff left the school but when he did not return that day, Defendant SMITH caused his immediate suspension. ROE returned the next day with his mustache, his father and his attorney, and demanded a hearing to inquire whether his mustache constituted a clear and present danger to discipline in Tom Paine High School. Defendant SMITH stated that no such hearing would be allowed and that Plaintiff ROE's suspension would continue until he shaved his mustache.

18. On September 29, 1969, fearing the effect on his studies as well as on the Tom Paine High football team of which he was captain, Plaintiff ROE shaved his mustache and returned to school, thereby ending his suspension one day before the automatic expulsion rule would have gone into effect.

19. Despite his forced compliance with the regulation, Plaintiff ROE believes he has a right to determine for himself whether to wear a mustache and that such a decision should not be the responsibility of Defendants BROWN, or SMITH, or the classes they represent.

20. On or about October 1, 1969 Plaintiff JOE appeared at Tom Paine High School with his hair overlapping his shirt collar by approximately one inch. He was informed by Defendant SMITH that this was in

violation of the District One Regulation and ordered home to remedy the situation. Against his wishes, but fearful of being suspended, he proceeded to have his hair trimmed in conformity with the regulation and returned to school the following day, where his appearance was approved by Defendant SMITH.

21. JOE has remained a student in good standing throughout the academic year. However, he desires once again to let his hair grow in violation of the regulation, but has been deterred from doing so by the existence and threatened use of the regulation.

Cause of Action

22. The District One Regulation and similar regulations, as authorized by Defendant JONES, promulgated by Defendant BROWN and enforced by Defendant SMITH are unconstitutional on their face and as applied in that they violate the freedom of speech and self-expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. Section 1983.

23. The Regulation is unconstitutional on its face and as applied in that it is overbroad in violation of the First and Fourteenth Amendments to the United States Constitution.

24. The Regulation is unconstitutional on its face and as applied in that it violates the right of privacy contained in the Bill of Rights to the Constitution of the United States.

25. The Regulation is unconstitutional on its face and as applied in that it violates the rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in that expulsion, suspension or threat thereof of the plaintiffs and the class they represent merely for exercising their personal tastes in grooming constitute cruel and unusual punishment.

26. The Regulation is unconstitutional on its face and as applied by violating the substantive due process rights of plaintiffs guaranteed by the Fourteenth Amendment in that the Regulation is arbitrary, capricious, unreasonable and not reasonably related to any substantive evil which the State has the right to prevent and not reasonably related to the valid governmental function of administration of the educational system.

27. The Regulation is unconstitutional on its face and as applied in that it violates the right to fair proceedings guaranteed by the due process clause of the Fourteenth Amendment. More particularly, it provides no method for an adversary hearing with the assistance of counsel before an impartial adjudicator whereby it can be determined _inter alia_ whether the student's appearance poses a substantial threat to any interest which the school administration can legitimately advance or whether the student has a compelling reason for his appearance.

28. The plaintiffs and the class they represent will suffer irreparable harm if they are or continue to be expelled, suspended or threatened with expulsion or suspension. Those suspended or expelled are suffering irreparable injury in missing their normal school activities and having their records marred by disciplinary action.

29. Those students who have been threatened with discipline or who have complied under protest are being caused psychological harm and anguish.

30. The plaintiffs and the class they represent have no other adequate or effective remedy at law for the harm or injury done or threatened by Defendants BROWN and SMITH and the classes they represent. Such irreparable injury will continue unless declaratory and injunctive relief are afforded.

WHEREFORE, Plaintiffs pray for an order:

(1) directing that this action proceed as a proper class action on both sides;

(2) declaring that the state-wide directive and implementing Regulation are unconstitutional;

(3) enjoining the defendants and the classes they represent from disciplining any student for violation of such Regulations;

(4) ordering the reinstatement of all students presently expelled or suspended for violation of such Regulations, with reasonable provisions to allow them to make up work;

(5) expunging the disciplinary records of all such students;

(6) pending a hearing in this matter, a Temporary Restraining Order be issued enjoining and restraining the Defendants and their classes from enforcing or threatening to enforce any such regulations governing appearance.

HAIR CASES

(Through January 27, 1970 Issue of U.S. Law Week)

Favorable:

Breen v. Kahl, 296 F. Supp. 702 (W.D. Wisc. 1969), aff'd, ____F.2d _____ 38 U.S. Law Week 2332 (7th Cir. 12/3/69), pet. for cert filed, 38 U.S. LW. 3348.

Richards v. Thurston, 304 F. Supp. 449 (D.C. Mass. 1969). 1/

Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967).

Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969).

Westley v. Rossi, 38 U.S. Law Week 2257 (D.C. Minn. 1969).

Miller v. Barrington, Ill. Schools, unreported (D.C. Ill. 1969, Parsons, J.).

*Cordoya v. Chonko, unreported (N.D. Ohio 1969).

*Slomovitz v. Miller, et al., unreported (N.D. Ohio 1969).

Meyers v. Arcata High School District, 75 Cal. Rptr. 68 (1969).

Lucia v. Duggan, 38 U.S. L.W. 2170 (D. Mass. 1969) (teacher with beard reinstated on due process grounds).

Finot v. Pasadena City Bd. of Ed., 58 Cal. Rptr. 520, 35 U.S. Law Week 2651 (1967) (teacher beard - due process).

Unfavorable:

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856.

Jackson v. Dorrier, _____F.2d _____ (6th Cir. April 6, 1970).

David v. Firment, 269 F. Supp. 524, Aff'd, 408 F.2d 1085 (5th Cir. 1969).

Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).

Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965).

Akin v. Bd. of Ed., 68 Cal. Rptr. 557, 36 U.S.L.W. 2773 (1968).

Brownlee v. Bradley County Bd., D. C. E. Tenn. 4/10/70 38 L.W. 2567.

---

*Contact the Ohio affiliate for further information.

1/ affirmed, _____F.2d_____ (4/28/70), an excellent opinion which gathers together all the long-hair school cases. (A copy is included in this package.)

BLACKMON, ISENBERG & MOULDS
Attorneys at Law
901 "F" Street, Suite 200
Sacramento, California 95814
Telephone: (916) 444-8680

RICHARD M. ROGERS
VISTA, Attorney at Law
1212 "F" Street
Marysville, California 95901
Telephone: (916) 742-5191

ABASCAL, KERRY & HABERFELD
Attorneys at Law
1212 "F" Street
Marysville, California 95901
Telephone: (916) 742-5191

Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MERLE KEITH JEFFERS, JR., a minor, by and through his Natural Guardian, MERLE KEITH JEFFERS; STEVEN P. SMITH, a minor, by and through his Natural Guardian, BERNARD P. SMITH; ALFRED GARY LOPEZ, a minor, by and through his Natural Guardian, RAYMOND LOPEZ, and on behalf of all others similarly situated,

Plaintiffs,

-vs-

YUBA CITY UNIFIED SCHOOL DISTRICT: CLARENCE SUMMY, Individually and as District Superintendent; JOHN HECKMAN, ALBERT POWELL, SAMUEL SHANNON, ROBERT BARTLETT, JAMES CHANGARIS, DELMONT EMERY, and LEO HOFFART, Individually and as Members of the BOARD OF TRUSTEES; GEORGE SOUZA, Principal of YUBA CITY HIGH SCHOOL; DON SOLI, Vice Principal of YUBA CITY HIGH SCHOOL,

Defendants.

NO. CIV. S-1555

SUPPLEMENTAL MEMORANDUM OF POINTS & AUTHORITIES

INTRODUCTION

Plaintiffs' Counsel had anticipated that at some point in this case, prior to final summation, opposing Counsel would submit Points and Authorities covering the law on which Defendants relied. That expectation was not realized as opposing Counsel waited until his final summation before citing any case law, and his presentation was then verbal, with no written Points and Authorities ever being submitted. As Plaintiffs' counsel were unfamiliar with several of his cited cases, two cases never having been reported, one of which had been received in opposing Counsel's office on the morning of summation itself, it was somewhat difficult to adequately respond to these cases during Plaintiffs' closing summation. Accordingly, we find it desirable to submit a Supplemental Memorandum of Points and Authorities to discuss some of the cases raised by opposing Counsel in his summation and to incorporate these cases both into Plaintiffs' summation and into our original Memorandum of Points and Authorities. We trust that our Supplemental Memorandum will be helpful to the Court.

CASES FROM THE FIFTH CIRCUIT

We start with the Fifth Circuit where eight of the jointly cited cases were decided. The first decisions to come down, in 1966, were Burnside v. Byars, 363 F.2d 744 (1966), and Blackwell v. Issaquerra Cty. Board of Education, 363 F.2d 749 (1966), which announced the test to be applied in school cases where the First Amendment is involved. This test is whether the regulation is "reasonable". The Fifth Circuit Court of Appeals did not define "reasonable" to mean any rational basis, but defined a "reasonable" regulation to be one essential in maintaining order and discipline on the school property. The opinions state that the regulation must measureably contribute to the maintenance of order and decorum. Burnside and Blackwell can be compared for examples of the application of this test. In one case the test was met, in the other it was not.

In 1967, the Fifth Circuit Appellate Court affirmed Davis v. Firment, 269 F.Supp. 824 (E.D.La.--1967) Aff'd per curiam, 408 F.2d 1088, in a per curiam decision. Davis held that the right of free choice in grooming was not fundamental; that a symbol must represent a particular idea, and that long hair is equivalent to conduct, like marching or picketing. We submit that equating long hair with clear acts of conduct, like marching or picketing, is an inaccurate characterization. If the wearing of black arm bands is akin to pure speech, see Tinker v. Des Moines Independent School District, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), then we would argue that the wearing of one's hair long, is also very closely connected to free speech, in that this is a non-verbal expression of rejection of the beliefs and views of an older generation which has set unacceptable standards, involving constitutional rights, for young adults.

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), on which Defendants strongly rely, involved members of a musical group who asserted that they had an economic interest in wearing long hair. The facts give the strong impression that the long hair was worn as a publicity gimic; radio and television news coverage was even brought to the school by the musicial groups' agent; and after suspension, the group made and released a recording concerning their experience with the high school and the hair issue. The Court assumed for the purpose of the decision that students have a fundamental right to wear long hair. This assumption is directly contrary to the holding in Davis that no fundamental right was involved in the wearing of long hair. The Court found substantial disruption in Ferrell which materially interfered with the state's interest in providing the best education possible. Thus, it is clear that the Court had returned in Ferrell, to the Burnside and Blackwell test. A reasonable regulation is one that is essential in maintaining order and discipline on school property.

After Ferrell, the U. S. Supreme Court decided Tinker on February 24, 1969. The Court enumerated several significant principles applicable to student rights and to authority exercised by Boards of Education. The Court stated that students do not shed their constitutional rights to freedom of expression at the schoolhouse gate, and further:

> "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount

> important principles of our government as mere platitudes." 21 L.Ed.2d 733, 738.

Though the Court recognized that "the problem posed by the present case [Tinker] does not relate to...hair style", citing Ferrell, the broad language of Tinker in defense of student rights while restricting the powers of Boards of Education, clearly is applicable to hair cases as well.

> "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among these activities is personal intercommuncation among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Viet Nam, if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars. But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not recognized by the constitutional guarantee of freedom of speech." cf. Blackwell.

Clearly in Tinker tne Court adopted the "material and substantial disruption" test announced by the Fifth Circuit in Burnside and Blackwell, and which was applied to the circumstances of Ferrell.

In three of four other hair cases in the Fifth Circuit, the District Court Judges have recognized the applicability of Tinker and Ferrell and applied the material and substantial disruption test. Zachry v. Brown, 299 F.Supp. 1360 (N.D.Ala.--1969), decided prior to Tinker, found no disruption and held that the equal protection clause of the Fourteenth Amendment prohibits classification of students upon an unreasonable basis. The Court held that hair was an unreasonable basis on which to classify. Further, the Court held that the principle of Ferrell applied but that the cases were distinguishable on their facts.

Calbillo v. San Jacinto Jr. College, 305 F.Supp. 857, (S.E.Texas--1969), a post-Tinker beard case, held that the definition of reasonable relationship was that stated in Burnside and Blackwell, but the Court found no disruption. Calbillo held that the regulation constituted a denial of equal protection, following the Zachry rationale.

Griffin v. Tatum, 300 F.Supp. 60 (M.D.Ala.--1969), held that a student's right to wear long hair is a protected fundamental liberty and applied the material and substantial disruption test. Griffin dealt with many of the asserted and theoretical disruptions presented in our case but held that state interests were not sufficiently compelling to outweigh the fundamental student right to wear long hair. Opposing Counsel sought to distinguish this case by reference to the peculiar and arbitrary hair rule involved without reaching the primary purpose for which the case was cited, namely, that it too reaffirmed the material and substantial disruption test.

Stevenson v. Wheeler City Board of Education, 306 F.Sup 97 (S.D.Ga.--1969), was a "clean shaven" mustache and facial hair case where the Court held, contrary to *Ferrell*, *Griffin*, *Zachry*, and *Calbillo*, that students had no fundamental right to choose th own style of grooming. Thus, *Stevenson* is the only case in the Fifth Circuit to follow *Davis*. It is extremely important to note that *Stevenson* was set in the climate of a Georgia school engaged in the delicate task of integration, concerned with racial and ethnic overtones, the last vestiges of slavery and dehumanization and the case must be read with those factors in mind.

In summary, we submit that the great weight of authorit in the Fifth Circuit establishes that:

1) To be "reasonable" a regulation must be essential in maintaining order and discipline on school property. *Blackwell*, *Burnside*, *Calbillo*, *Griffin*, *Zachry*.

2) To be "essential" means the regulation is required to, in fact, prevent material and substantial disruption. *Ferrell*, *Blackwell*, *Burnside*, *Calbillo*, *Griffin*, *Zachry*.

3) The right to wear long hair is a fundamental right. *Ferrell*, *Zachry*, *Calbillo*, *Griffin*.

4) Where there is material and substantial disruption, the fundamental liberty is outweighed by the state's interest in order and discipline in the schools. *Blackwell*, *Ferrell*.

5) Where there is no showing of material and substantial disruption, the regulation is not reasonably related to the educational process. *Zachry*, *Calbillo*, *Griffin*,

Ferrell, Burnside.

- -

OTHER COURT OF APPEALS DECISIONS

There are two other Court of Appeals decisions in hair cases, Breen v. Kahl, 419 F.2d 1034, (7th Cir.--1969) Cert. granted 38 LW 3348, Dokt. #1274, and Jackson v. Dorrier (6th Cir.--April 6, 1970) ____ F.2d ___. The facts in Jackson are very similar to the facts in Ferrell. The Plaintiffs again were members of a musical group; a commercial interest, not a freedom of expression interest, was being asserted.

> "Neither of the students testified that his hair style was intended as an expression of any idea or point of view. We agree with the findings of the District Court that this record does not disclose that the conduct of Jackson and Barnes and the length of their hair were designed as an expression within the concept of free speech. Therefore Tinker v. Des Moines School District, 393 U.S. 503 (1969), has no application."

Further, in Jackson, by contrast to Breen, there was testimony that long hair was intended to foster a purely commercial interest. The Court found that there was no constitutional right infringed by the regulation or its enforcement. Ferrell, in contrast, assumed for the purposes of the opinion that the First Amendment was applicable and specifically found that the growing of hair for commercial purposes was protected by the liberty and property concepts of the Fifth and Fourteenth Amendments. Jackson did not discuss the Fifth and Fourteenth Amendments.

Thus, a comparison of Jackson with Ferrell demonstrates that while Jackson claims to follow Ferrell, the Sixth Circuit Court did not understand Ferrell and its reasoning. Jackson is much closer to Davis which was implicitly rejected in Ferrell. By concluding, in Jackson, that no constitutional rights were involved, the Court was able to hold that the Board of Education had the power to make and enforce the regulation without discussion of the materiality and substantiality of the disruption and disturbance, and without discussion of less subversive alternatives available to the school for control of the disruption and disturbance due to long hair.

Breen, on the other hand, while dealing with a regulation identical to that in the instant case, found no evidence of disruption or disturbance due to long hair. The Court held that a person's right to wear his hair as he likes is an ingredient of personal freedom protected by the U. S. Constitution, and, therefore, the State bears a substantial burden of justification when it seeks to infringe that right. In the absence of evidence of substantial disruption, this burden is not sustained. Breen is consistent with Burnside, Blackwell, Tinker, Ferrell, Zachry, Calbillo, and Griffin. Because the Court found that students have a protected constitutional right to wear long hair, it is inconsistent with Davis, Stevenson, and Jackson.

- -

OTHER DISTRICT COURT DECISIONS

Crews v. Cloncs, 303 F.Supp. 1370, (S.D.Ind.--1969), is a

District Court decision out of the Seventh Circuit which came to a conclusion contrary to Breen v. Kahl, 419 F.2d 1034 (7th Cir.--1969) Cert. granted, 38 LW 3348, Dokt. #1274, but on a factual distinction and not because it rejected the majority test of material and substantial disruption. The Court specifically found that Plaintiffs did materially and substantially interfere with the requirements of appropriate discipline in the school. As no examples of disruption were given, however, we have only the conclusary statement that disruption and discipline problems existed. Since it held that the school authorities had met their burden of justification by showing actual classroom disruption of a material and substantial nature, Crews is consistent with the majority view and lends no support to Defendants' position that all they need to show is a reasonable relationship to the educational process.

Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F.Supp. 1316, (D.Colo.--1969), is another case on which Defendants rely. The facts in that case are significantly different from those in the instant case. In Brick the students played a significant role in the adoption and review of dress codes, and an overwhelming majority of students wished to maintain the hair regulations, and not change them. Also, as opposed to the instant case, there was substantial evidence of disruption and distraction in Brick. In our case, no such evidence was introduced.

The Court held in Brick that such symbolic expressions of individuality as hair are not within the First Amendment but are protected by the due process clause of the Fourteenth Amendment.

While the language in Brick appears to rely on the minority view announced in Davis, the analytical framework is consistent with the majority view. The Court specificially found that there was evidence of material and substantial disruption. If the Brick Court had before it the facts of the instant case, where the students were not allowed to play any role in the adoption and review of male hair regulations, where an overwhelming majority of students wished to abolish male hair regulations, and where the disruptive incidents, if in fact there were any, were as insubstantial as those brought out in our case, the Court clearly would have held to the contrary.

There are two District Court decisions out of the Eighth Circuit, Sims v. Colfax Community School District, 307 F.Supp. 485, (S.D.Iowa--January 16, 1970), and Westley v. Rossi, 305 F.Supp. 706, (D.Minn.--1969). In Westley the Court applied the material and substantial disruption test to each of the many arguments presented similarly in the instant case. The Court found that no health hazard was involved as long as hair was kept clean and that protective devices could be worn where long hair presented a possible safety hazard. Answering the argument that discipline and disruption problems might occur, the Court cited Tinker for the principle that undifferentiated fear is not sufficient to overcome the right to free expression. The Board of Education contended that it was concerned with the personal safety of the Plaintiff; the Court answered that acts of hostility should be prevented, not expressions of individuality, and that it was Plaintiff's choice whether to expose himself to harassment, not the schools' business. The Court held the regulation to be an invasion of private life beyond the jurisdiction of the school.

Speaking to the reasonable relationship argument, the Court said, clearly relying on the Burnside and Blackwell definition of "reasonable":

> "Regulation of conduct must bear a reasonable basis to ordinary conduct of the school curriculum or to carrying out the responsibility of the school. No moral or social ill consequences will result to other students due to the presence or absence of long hair nor should it have any bearing on the wearer or other students to learn or to be taught."

Westley is definitely in line with the majority on the hair issue.

While opposing Counsel sought to distinguish Sims v. Colfax on the ground that it involved a girl protesting hair regulations, the decision is still significant in that it holds that only those school rules that are reasonable are permissable, defining "reasonable" in the same manner as Tinker, Burnside, and Blackwell. In a lengthy analysis the Court indicated the differences in the various approaches to the hair problem, and the Court took the position that the school authorities must show a compelling reason to infringe upon this important constitutional right, namely, material and substantial interference with the educational process.

The regulation enjoys no presumption of constitutionality and the test applied by the Court was strictly objective: the school authorities have the burden to show that the rule actually prevents disruption. Mere conclusions that long hair may be disruptive is not the test of reasonableness. Any rule could be justified on such a standard.

Richards v. Thurston*, 304 F.Supp. 449 (1969), (D.Mass--1969), is a hair decision by Judge Wyzanski. In this case there was no formal rule and no evidence of disciplinary problems. The Court found that the reason behind the suspension was the arbitrary prejudice of the principal; the Court held that personal prejudice was not such a rational ground for dictating hair style as to support an official order interfering with the student's liberty to express himself in his own way in his search for identity. The Court found that an individual's choice of hair style is protected by the Fourteenth Amendment Due Process Clause. In a Supplemental Opinion Judge Wyzanski stressed that no rational basis for the suspension was alleged.

In a Second Supplemental Opinion Judge Wyzanski, discussed Crews v. Cloncs, observing that the Plaintiff was there barred principally because his hair caused others to be disorderly. Judge Wyzanski took the position that a man may not be restrained from doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act. In a Third Supplemental Opinion Judge Wyzanski stressed that the wearing of long hair is part of freedom of expression or an aspect of ordered liberty.

---

* See Appeals Court opinion, infra. p. 106

It is clear that Judge Wyzanski's position is consistent with the majority in regard to the substantial and material disruption test and the reasonable relationship test. It is also consistent with the majority in finding a protected constitutional right, either under the First Amendment or through the Fourteenth Amendment Due Process Clause. Further, Judge Wyzanski recognized that long hair does not cause disruption by itself, and therefore, disruptive acts should be prohibited, not long hair. This view is supported by Burnside, Blackwell, Tinker, and Terminiello v. Chicago, 377 U.S. 1, 69 S.Ct. 894.

In the Ninth Circuit there have been three hair cases, Olff v. Eastside Union High School District, 305 F.Supp. 557, (N.D.Cal.--1969), Neuhaus v. Torrey, (9th Cir. March 10, 1970), and Contreras v. Merced High School District, (U.S.D.C.--E.D.Cal.--1968), No. F-245-Civ. In Olff, Judge Peckham was dealing with a rule substantially like the one in the instant case. He found the rule to be overbroad under the First Amendment in that particular circumstances where long hair might be a health or safety problem were not specified. He relied on Richards for the principle that merely arbitrary choices cannot be enforced against an individual's serious claims of liberty, and the State must make a strong showing of need in order to curtail a constitutional right. He held that the regulation inhibited free expression more extensively than is necessary to achieve legitimate governmental purposes.

Olff is clearly in line with the majority view as to the proper test to be applied to school regulations when free expression is involved.

Neuhaus v. Torrey, another case on which Defendants rely heavily, involved a factual situation radically different from that in the instant case. There, the hair regulation applied only to members of the school athletic teams, not to the entire student body, and Judge Harris found that long hair could adversely affect athletic performance. He also found that in the athletic setting there was no constitutional right to wear long hair, and he stressed that he was dealing with the delicate relationship between athlete and coach, a relationship uniquely characterized by discipline and morale factors. If the athlete chose to wear long hair, the consequence was "merely to forego any athletic competition", not to forego a public education. He held that there was no impairment of constitutional prerogatives to require Plaintiffs to bring themselves within the spirit, purpose and intendments of the rule.

While Judge Harris applied a rational relationship test, he was concerned solely with the athletic setting, and it is clear that he did not intend application of his analysis to a hair regulation applicable to all male students, regardless of participation in formal athletic competition.

In Contreras, a pre-Tinker decision, the Court found that the Plaintiffs had excessive absences to the point of being habitual truants; that their hair was not neat, well kept, or decorous; that the regulation was reasonable and rational, and that long hair was likely to result in disruption and disturbances. The Court indicated, in a closing remark, that anything that interferes with the right of the majority and the operation of the school district in the educational system has to give way. The Court did not find that a constitutional right was involved, and, in light of Tinker, the Court's analytical framework was, we submit, overbroad. Contreras is consistent only with those few cases which found that the wearing of long hair was not protected by the First Amendment nor any other amendment to the U. S. Constitution, namely, Davis, Stevenson, and Jackson. We have already distinguished those cases.

- -

STATE CASES

Two State cases remain to be considered, Leonard v. School Committee, 349 Mass. 704, 212 N.E.2d 468 (1965), and Akin v. Board of Education of Riverside Unified School District, 68 Cal. Rptr. 557 (1968). In Leonard, the Massachusetts Supreme Court had before it a vague regulation and the Court dealt solely with State law, except for holding that the Fourteenth Amendment Due Process requirements were met by the principal's verbal directive to the student and a hearing before the Board of Education. First Amendment arguments were not discussed, and the Court applied a simple rational basis test. Note also, that Leonard was a pre-Tinker case. In Leonard, Plaintiff was a professional musician and the Court held that an economic interest in hair was not sufficient to raise constitutional claims. This holding is contrary to the holding in Ferrell that an economic interest does raise constitutional claims under the Fifth Amendment. It is interesting to note that the regulation in question would be void in vagueness in California. See Meyers v. Arcata Union High School District, 75 Cal.Rptr. 68 (1969).

Akin is an abberrational beard case, where the Court found no disruption or distraction by the Plaintiff, but that his beard did constitute a disruptive influence in that it lead to teasing by other students and that other students wanted to follow his beard growing example. The Court held that the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, but it relied on Ginsberg v. New York, 390 U.S. 629 (1968). This rationale was laid to rest in Tinker, and no other Court has adopted the rationale of Akin. Compare Akin with Finot v. Pasadena City Board of Education, 58 Cal.Rptr. 520 (1967).

- -

THE FACTS OF THE INSTANT CASE

In reaching a decision in this case we would stress several unique facts that have been introduced into evidence. First, an overwhelming majority (70-83%) of the student body at Yuba City High School have indicated that they wish to abolish male hair regulations. The Student Body Government passed a resolution to abolish male hair regulations. The resolution was vetoed by the Principal. Only three disruptive incidents occurred at the High School over the past several years. One of the three incidents took place in a Special Education Class for the mentally retarded; another involved "distraction" of a music class by a long haired visitor in 1968, when long hair styles were still relatively new. The third incident allegedly involved a fight in the hall, which the teacher who testified did not actually see but he believes came about as a result of teasing and long hair. These three incidents were well within the control of the faculty, and it can hardly be argued that they rise to the level of material and substantial disruption, nor indeed, that they in any way match the level of disruption occasioned by evidence of school sanctioned activities, donkeys and goats paraded through the classroom; beard growing contests for students and faculty; and crazy dress week where admittedly, little in the way of formal instruction is accomplished.

Defendants argue that a reasonable basis test should be applied, but they fail to recognize that the overwhelming weight of authority defines "reasonable" in this context as those regulations which are essential in maintaining order and discipline on school property. It approaches absurdity to argue that a hair regulation is "essential" in a school where the students have voted overwhelmingly to abolish that regulation. Indeed, the Plaintiffs testified that they have been allowing their hair to grow long since last summer, a period of at least seven months, and they have not been involved in nor observed any incidents of disruption or disturbance involving long hair. They have further testified and their records bear witness to the fact that the long haired Plaintiffs, are well above average students who attend school regularly and have no disciplinary blemishes on their records, aside from the suspensions occasioned by their refusal to cut their hair in accordance with the school regulation.

Defendants assert that upon any rational basis they have the power to deny Plaintiffs and others similarly situated a public education until and unless they cut their hair. At bottom, they assert that the compelling state interest test (in the school setting, denominated the "material and substantial disruption" test) which is applicable whenever a governmental body attempts to infringe an individual's constitutional rights, is inapplicable in the school setting. Defendants refuse even to consider less onerous alternatives. Such a position is constitutionally invalid. Sherbert v. Verner, 374 U.S. 398 (1963), and Shelton v. Tucker, 364 U.S. 479 (1960).

Long hair at Yuba City High School is not the novelty it once was. The fears of the Defendants that long hair will lead to disruption and distraction is an undifferentiated fear not based on reality. There are presently many people in the Yuba City area who wear their hair in a style which would be in violation of the regulation at Yuba City High School; there are many long haired students at the Yuba College and at a sister high school, Marysvill

Union High School; there are shows on television which feature long haired male actors; there are news reels, movies, and magazines featuring long haired participants; and finally, that between 70 and 83.7% of the students at Yuba City High School support abolition of male hair regulations, we submit, is conclusive evidence that styles are changing, even in the Yuba City area.

* * *

CONCLUSION

We submit that while there is a split in authority, the better reasoned cases and the overwhelming weight of authorities support the position of Plaintiffs in this case. We clearly are here dealing with a First Amendment Freedom of Expression Right, where young adults are expressing their personal identities and passively, unobtrusively and non-verbally are asserting their opposition to the standards of another generation. And, the circumstances at Yuba City High School, including uncontroverted testimony of several teachers of no disruption from the wearing of long hair and no tension or devisiveness stemming from the wearing of long hair, plus the overwhelming voice of the young adults themselves, demonstrates that there is no reasonable basis on which to impose a male hair regulation. Clearly, there is no evidence of material or substantial disruption. What we do have here, is an intransigent generation applying one standard to measure disruption when dealing with activities proposed or sanctioned by the administration, and another standard when dealing with student initiate change. Neither reason, logic nor basic fairness permit this type of arbitrary imposition of restrictive regulations where First Amendment Freedom of Expression Rights are involved. Further, in defense of their constitutional rights, the students have explored every avenue open to them in their attempt to maturely and responsibly bring about change in a regulation which directly affects them alone -- twenty-four hours a day! They now come to this Court for redress of grievances, having been denied relief at every other step along their path by intransigent, unyielding and inflexible administration. There is no other avenue of redress existant for these young adults: They have significant grievances but they are caught in the web of an unresponsive and unyielding system. There can be no question but that judgment must be for Plaintiffs.

DATED: April 23, 1970.

RESPECTFULLY SUBMITTED,

BLACKMON, ISENBERG & MOULDS
ABASCAL, KERRY & HABERFELD
RICHARD M. ROGERS

BY: ______________________
Attorneys for Plaintiffs.

DONALD H. GLASRUD
Attorney at Law
4780 North Safford Avenue
Fresno, California

Telephone: 225-6320

DONALD C. THUESEN
Attorney at Law
8th Floor, 1060 Fulton
Security Bank Building
Fresno, California

Telephone: 268-6145

Attorneys for Amicus Curiae

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MADERA

DANIEL MONTALVO, a minor through his father and guardian ad litem, RICHARD MONTALVO,	No. 16586
Plaintiff,	AMICUS CURIAE
vs.	
MADERA UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, et al,	
Defendants.	

NOTE: This is an excerpt from an *amicus* brief filed by the American Civil Libert
Union of Northen California. The *Montalvo* plaintiffs lost in the trial co
but the case is now being appealed.

INTRODUCTION

Under challenge in the instant case is a regulation governing student hair length and style adopted by the Board of Education of the Madera Unified School District. This regulation provides as follows:

> Hair must be clean and well groomed. Boys must keep their hair neat and trimmed above the eyes, ears, and collars. Hair must be tapered up from the neck.

Because the court has expressed its desire that amicus refrain from taking a protagonist's position, this amicus brief is limited to a discussion of the constitutional issues which arise from attempted regulation of hair styles by public school authorities. This brief sets forth the constitutional standards which the American Civil Liberties Union of Northern California believes must be applied in all cases involving public school regulation of hair fashion; no attempt is made to argue how these standards should be applied under the facts of the instant case.

I

STUDENT HAIR FASHION IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Expression by School Children is Entitled to First Amendment Protection

It cannot be denied that California school officials have the authority to mulgate rules and regulations governing the operation of the schools in general and student conduct in particular. The Constitution of the State of California places upon the state legislature the duty and the power to maintain a system of free public education in the state. Cal. Const. art. IX, §1,5. The legislature has, in turn, delegated authority to local school districts to operate public schools (Educ. Code §921) and to promulgate rules and regulations governing student conduct and behavior. Educ. Code §10604. These regulations may be enforced by suspension or expulsion of students who refuse or neglect to obey them. Educ. Code §§10604, 10609; and see generally, Meyers v. Arcata Union School District, 269 A.C.A. 633, 640-641; Akin v. Riverside Unified School District Board of Education, 262 Cal. App. 2d 161, 167.

However, as with all rules, regulations, and statutes passed or promulgated by governmental bodies in our nation , school rules and regulations must pass constitutional muster. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969); West Virginia State Board v. Barnette, 319 U.S. 624 (1943). Where public school regulations governing dress and grooming clash with constitutionally protected rights of students, the regulations must yield. Meyers v. Arcata Union School District, supra; Breen v. Kahl, 296 F. Supp. 702.

It is now firmly settled that minors are entitled to many of the protections afforded by the United States Constitution. In re Gault 387 U.S. 1. The rights afforded by the First and Fourteenth Amendments have long been recognized to extend to children as well as adults. Indeed, the United States Supreme Court declared as long ago as 1943 that the First Amendment rights of minors must be protected from encroachment by school authorities. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted." West Virginia State Board v.

Barnette, supra at 637. In that case the United States Supreme Court held unconstitutional the expulsion from school of students for thier failure to salute the flag of the United States. And the Court, per Mr. Justice Jackson, said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or for citizens to confess by word or act their faith therein." Id., at 642.

The United States Supreme Court, in its last term, must surely have silenced all possible debate as to the availability of the First Amendment right of freedom of speech or expression in the public schools. In Tinker v. Des Moines Independent Community School District, supra, its most significant decision in the area of juvenile rights since In re Gault, supra, the Court said at 506:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

See also, Burnside v. Byars, 363 F.2d 749 (5 Cir. 1966); L. A. Teacher's Union v. Los Angeles City Board of Education, 71 A.C.A. 572, 579; Mandel v. Municipal Court, 276 A.C.A. 788, 805.

The United States Supreme Court held in Tinker that the wearing by school children of black arm bands protesting the Vietnam war constituted symbolic speech. The court affirmed that this exercise of expression by public school students was entitled to the protections afforded by the First Amendment.

Amicus believes that the settled entitlement of public school students to First Amendment liberties, as affirmed by Tinker, must control the determination of the instant case.

B. Hair Fashion is a Form of Expression Protected by the First Amendment

Almost as equally well settled, is the proposition that an individual's right to groom himself as he pleases is a liberty guaranteed by the Fourteenth Amendment to the United States Constitution. This right was recognized in the last century in Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (No. 6, 546) (C.C.D. California 1879). In that case the sheriff of San Francisco cut off the queue of a Chinese inmate of the county jail. The court, per Field sitting as Circuit Justice, found the sheriff's action to be "cruel and unusual punishment," saying:

> "The cutting off the hair of every male person within an inch of his scalp, on his arrival at jail, was not intended and cannot be maintained as a measure of discipline, and can only be a measure of health in exceptional cases." Id., at 254.

In his note on the Ho Ah Kow case in 18 Am. Law Reg. 685, Judge Cooley made the following observations:

> "There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right. The state might, with even more color of reason, regulate the tables of its citizens than their methods of wearing their hair; for the first might do something towards establishing temperance in eating, while the other would be simply absurd and ridiculous." [Quoted in footnote to Ha Ah Kow v. Nunan, supra, 254-255.]

Ho Ah Kow is supported by subsequent dictum in opinions of the United States Supreme Court. In Kent v. Dulles, 357 U.S. 116 (1958), the United States Supreme Court, in dealing with the right of a citizen to leave the country, observed:

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." Id., at 126 (emphasis added)

At the same page the Court also quotes the following from Chafee, Three Human Rights in the Constitution of 1787, 197 (1956):

> "Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." (emphasis added)

The California courts have announced that the right of an individual to freely choose his hair fashion is protected by the constitutional guarantee of freedom of expression.

The right of an adult to wear a beard is protected by the First Amendment. Finot v. Pasadena City Board of Education, 250 Cal. App. 2d 189, 198 (1967), after citing the above quoted language in Kent v. Dulles, supra, and noting that "A beard was part of what appellant wore and it obviously was close to his heart," held that the wearing of a beard is a fundamental liberty guaranteed by the United States Constitution against state infringment. There the court ordered the reinstatement of a public school teacher who had been removed from his regular teaching duties because of his beard. The court said:

> "It seems to us that the wearing of a beard is a form of expression of an individual's personality and that such a right of expression, although probably not within the literal scope of the First Amendment itself, is as much entitled to its peripheral protection as the personal rights established by Pierce and Meyer with respect to the right of parents to educate their children as they see fit. It will be noted that these last mentioned rights likewise relate largely to nonverbal conduct rather than to speech itself, but so does, to a significant degree, the consitiutional right of political activity established in California by Fort, supra, and so does, for example, picketing (Thornhill v. Alabama, 310 U.S. 88 [84 L. Ed. 1093, 60 S.Ct. 736]), and the carrying of a red flag (Stromberg v. California, 283 U.S. 359 [75 L. Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484])." Id. at 199.

California appellate courts have also held that the wearing of a chosen hair style by a juvenile is similarly entitled to First Amendment protection. The first California case to recognize this right was Akin v. Board of Education of Riverside Unified School District, 262 Cal. App. 2d 161. Although Akin upheld the validity of a school regulation against wearing beards, the court nevertheless recognized that the wearing of a beard is a constitutionally protected right of a juvenile. Akin v. Board of Education, supra, at 166-167.

In Meyers v. Arcata Union High School District, supra, where the court struck down a student hair length regulation for unconstitutional vagueness, it was said:

> "The wearing of a beard by one engaged in the educational process is an expression of his personality and, wearing it, he is entitled to the protection of the First Amendment of the Constitution of the United States (Citations omitted). Because a long hair style is indistinguishable from a beard for constitutional purposes, a male affecting it in a school is entitled to the same protection. Adulthood is not a prerequisite: the state and its educational agencies must heed the constitutional rights of all persons, including school boys (citations omitted)." Id., at 641-642.

The argument that student hair style is a form of "expression" protected by the First Amendment has been raised in recent decisions of at least seven U.S. District Courts. Five of these decisions found it unnecessary to decide the issue, chosing instead to invalidate hair length regulations on the ground that they invaded a constitutionally protected right of privacy.[1] Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969)[2]; Breen v. Kahl, 296 F. Supp. 702, 705-706 (W.D. Wisc. 1969); Richards v. Thurston, Civil No. 69-993-W, D.C. Mass., September 23, 1969; Olff v. East Side Union High School District, Civil No. 52282 N.D. Calif., October 1, 1969; Westley v. Rossi, summarized in 38 U.S. Law Week, 1066, D.C. Minn., October 8, 1969.[3]

However, serious discussion is given in several of these cases to the proposition that hair style constitutes expression. In Breen v. Kahl, supra, it is said at 705:

> "Whether wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression is not a simple question. Unquestionably, it is an expression of individuality, and it may be . . . that the manner in which many younger people wear their hair is an expression of a cultural revolt."

In his very recent opinion in Olff v. East Side Union High School District, supra, Judge Peckham, observes:

---

1. For our argument that hair style is also constitutionally protected by the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479, see Part III, infra, this brief.

2. This case also holds the particular regulation involved to violate the equal protection clause of the Fourteenth Amendment. 300 F. Supp. 60, 62.

3. At the time of writing only the U.S. Law Week summary of this decision is available to amicus. However, if the summary is accurate, this decision follows the reasoning of Richards v. Thurston, supra.

> ". . . This court holds the regulations to be unconstitutionally overbroad in that they inhibit free expression more extensively than is necessary to achieve legitimate governmental purposes."

Another recent U. S. District Court decision, Crews v. Clones, Civil No. IP 69-C-405, S.D. Ind., September 17, 1969, recognizes that hair style can be an expression of opinion constituting symbolic speech protected by the First Amendment; however, that case upholds the school regulation in question. See also, Ferrell v. Dallas Independent School District, 392 F. 2d 697, which seemingly recognizes hair style to be a matter of expression, but which nevertheless upholds the regulation attacked.

At least one U.S. District Court decision holds specifically to the contrary. In Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967) the court specifically refused to recognize a high school student's haircut as symbolic expression saying:

> "A symbol is merely a vehicle by which a concept is transmitted from one person to another, unless it represents a particular idea, a 'symbol' becomes meaningless."

Amicus takes issue with this too restrictive definition of symbolism. Symbols do not convey a "particular" idea but instead are ambiguous signs whose referrents are elusive.

> "People seldom realize that a style of dress, of hair, and of every kind of external nonconformity represents a sort of language, albeit frequently vague and unintelligible. So far, no one has compiled a dictionary of these 'languages' nor researched their grammar and syntax. Nevertheless, they are forms of expression.. . . Languages themselves would have no significance if objects did not possess a speech of their own. World literature would be meaningless if the human spirit did not try to express itself in the most divergent possible ways." Singer, "The Extreme Jews", Harper's Magazine, 55, 56, April 1967.

Few would take issue with the proposition that a symphony score constitutes symbolic expression entitled to First Amendment protection. Yet, it is difficult to argue that the symbols which make up the symphony score represent particular "ideas" within the Davis v. Firment definition. The message conveyed by the affectation of long hair is no less elusive than that conveyed by a symphony.

To some wearers, long hair may be a specific protest toward restrictive and inhibitive school and societal restrictions. In many cases long hair worn by male students conveys nothing more than: "I am an individual;" "I am a nonconformist;" or, "I am a member of a particular sub-group of our society." Yet, it is submitted that this elusive message is sufficient to constitute symbolic expression protected by the First Amendment.

In Meyers v. Arcata Union High School District, supra:

> "A California court has observed that men wear beards as symbols (symbols of masculinity, authority and wisdom or of nonconformity and rebellion), and that it is the symbolic value which merits constitutional protection. (Citations omitted) The symbolic value of long hair on a male is probably less obvious: we do not readily accept it as symbolic of masculinity, for example, and in the modern secondary school it may bespeak conformity rather than otherwise. . . . Its symbolic value, however, need not be judicially assessed: The symbolism is subjective in the person wearing it. 'A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.' (Board of Education v. Barnette, 319 U.S. 632-633 . . .). If a growth of hair means anything to its wearer (including the right to wear it long), the First Amendment protects him in affecting it, and this is so whether he displays it on his chin or on his scalp." Id., at 641-42, footnote 6.

Amicus believes that long hair affected by male students is entitled to protection as a First Amendment liberty.

United States Court of Appeals
For the First Circuit

No. 7455.

ROBERT RICHARDS,
a Minor by his father and next friend
ROBERT RICHARDS, JR.,
PLAINTIFF, APPELLEE,

v.

ROGER THURSTON,
as Principal of Marlboro High School,
DEFENDANT, APPELLANT.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee adopts the Statement of the Case in Appellant's brief except to note that the record does not af-

firmatively show whether or not the appellee was present in court on September 23, 1969, and whether his presence and appearance were acknowledge by the judge.

ISSUES PRESENTED FOR REVIEW

1. Does a male student have a basic personal right protected by the Constitution, to wear his hair as he chooses without interference from any governmental authority, absent a clear and overriding justification for the interference.

2. Was the action of appellant, based upon personal predilections for hair styling and not upon any written regulation, a violation of the appellee's rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE ACTION OF THE DEFENDANT WAS AN INFRINGEMENT OF THE PLAINTIFF'S CONSTITUTIONALLY PROTECTED FUNDAMENTAL RIGHT OF PERSONAL LIBERTY

The defendant suspended plaintiff from the Marlboro High School *solely* on the basis that the defendant thought the plaintiff's hair too long. (A. 6, Answer Par. 5) The defendant does not deny that, apart from his edict, the plaintiff is entitled to the status of a student at Marlboro High School. Contrary to the suggestion in the amicus curiae brief, it is clear that in Massachusetts students attend public schools as a matter of right, which is legally protected. Mass. G. L. Ch. 76, §16; *Leonard* v. *School Committee of Attleboro*, 349 Mass. 704. "Few rights are

of more importance to our youth than the right to attend our public schools." *Id.* at 707.[1]

The Court below held that plaintiff has a constitutionally protected right to "his liberty to express in his own way his preference as to whatever hair style comports with his personality and his search for his own identity" (A. 44). In so doing, the Court was by no means establishing a novel principle but rather was following the precedents set in three United States District Courts and subsequently followed in the Court of Appeals for the Seventh Circuit and in the U.S. District Court for the District of Minnesota. *Breen* v. *Kahl*, 296 F.Supp. 702 (W.D. Wis. 1969); *Griffin* v. *Tatum*, 300 F. Supp. 60 (N.D. Ala. 1969); *Zachary* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); ***Westley* v. *Rossi*, 38 Law Week 2257 (U.S.D.C. Minn. 1969); *Breen* v. *Kahl*, — F.2d — (7 Cir. 1969, Nos. 17552, 17553). The Court below recognized that its decision was possibly in conflict with a decision of the Court of Appeals for the Fifth Circuit in wh ch Chief Judge Tuttle dissented,** *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), cert. denied 393 U.S. 856 and one Federal District Court, *Crews* v. *Clones*, 303 F. Supp. 1370 (S.D. Ind. 1969). *See also Davis* v. *Firment*, 269 F. Supp. 524 (E.D. La. 1967). *Leonard* v. *School Committee of Attleboro*, *supra*, did not consider the constitutional issues here involved. It is the position of the Plaintiff that those cases denying reinstatement to expelled students are distinguishable from the present case and in any event fail to give sufficient recognition to the constitutional rights involved.[2]

---

[1] In any event, even if a student does not have a "right" to attend public school, unconstitutional conditions could not be attached to the "privilege" of attending. E.g., *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). And see the cases in note 2, *infra*.

[2] In addition New York and other states have administratively recognized the constitutional right of a student to the liberty of determining

As Judge Johnson stated in *Griffin* v. *Tatum, supra* at 62:

> "Although there is disagreement over the proper analytical frame work, there can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. Indeed, the exercise of these freedoms is highly important in preserving the vitality of our traditional concepts of personality and individuality."

The right to determine one's own hair style as an ingredient of personal liberty is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. The source of this protected liberty has been found in "penumbras" of the first amendment freedom of expression in the manner suggested in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), see e.g. *Breen* v. *Kahl, supra* (7th Cir. 1969), and as an aspect of the personal liberty contained in the due process clause, e.g. *Breen* v. *Kahl*, 296 F. Supp. 702; *Griffin* v. *Tatum, supra;* c.f., *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). See also the dissent of Douglas, J. in *Ferrell* v. *Dallas Indep. Sch. Dist., supra.*

An individual's mode of wearing his hair is one of the fundamental liberties protected by the Fourteenth Amendment. Few things are perceived by most people as more basic to the personality and ordinarily irrelevant to the concerns of the State than one's possessive physical appearance. Absent a showing of compelling need, to interpose the power and judgment of the State between the individual and his personal appearance is the grossest infringement upon the right of an individual to determine for himself his self image and the image which he wishes to project to others. "Where there is a significant enroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). Here, there can be no doubt that a substantial and unjustified infringement of personal liberty has occurred. As suggested by the District Court in *Breen* v. *Kahl, supra*, 296 F. Supp. at 704, it is instructive to look at the rights here involved outside of the educational context. For a state to enact a statute or a city an ordinance stating that all males must have beards and all females short hair "would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity and would invade human 'being'. It would violate a basis value "implicit in the concept of ordered liberty,' *Palko* v. *Conn.*, 302 U.S. 319, 325 (1937). It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment."[3] *Breen* v. *Kahl, supra*, 296 F. Supp. at 706.

Moreover, to force a student to cut his hair amounts to a state required intrusion upon his bodily integrity, an interest to be entitled to constitutional protection. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Schmerber* v. *California*, 384 U.S. 757 (1966).

205(c)(i)

Finally, the length and style of one's hair generally is more than just an expression of one's personality but is generally an expression of one's status in the com-

---

the length of his hair. See, e.g., *In re Myers*, 9 N.Y. Ed. Dept. Rep. Dec. No. 8021 (1969), *In re McLagan*, 9 N.Y. Ed. Dept. Rep. Dec. No. 8027 (1969).

[3] It is clear that the plaintiff's status as a student or former student is of no constitutional relevance.

> "In our system state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they must respect their obligations to the state."

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). See also *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1942); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

munity, one's occupation, life style and one's hierarchy of values. Hair is often an expression of one's religion such as in the case of the Amish or of the Hasidic Jews and, in the context of current society, is often a non-verbal expression of one's racial or ethnic pride or one's political or philosophical views or attitudes. See, e.g., *Ho Ah Kow* v. *Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879); *Breen* v. *Kahl, supra*, 296 F. Supp. at 705 n. 3. This is not a recent phenomenon for the length and style of hair has historically had political and ideological overtones. See, e.g., Appendix I, Mackay, *Extraordinary Popular Delusions and the Madness of Crowds*, at 346 et seq. For this reason the right recognized by the Court below is closely related to types of expression traditionally protected and is within the penumbra of the First Amendment. Note, *Symbolic Conduct*, 68 Col. L. Rev. 1091, 1093-1105 (collecting cases). Compare memorandum of Harlan, J., in *Cowgill* v. *California*, — U.S. — 38 Law Week 3266 (Jan. 20, 1970).

II. THE RIGHT TO EDUCATION AND TO ATTEND SCHOOL IS A FUNDAMENTAL RIGHT OF CRITICAL IMPORTANCE IN THE CONTEMPORARY WORLD

The right to take full advantage of the educational opportunities offered by the state should properly be characterized today as a fundamental right and liberty.

Participation in the educational process offered by the state has been recognized to have critical importance for a child's well being and development. *Brown* v. *Board of Education*, 347 U.S. 483, at 493 (1954) stressed that:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

See also *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom., Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); "Developments — Equal Protection," 82 Harv. L. Rev. 1065, 1120, 1183-1187. And see *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

Increasingly, a right to education has been seen as necessarily subsumed in the grant of specific constitutional rights. With respect to rights guaranteed to the criminal accused under the Fifth and Sixth Amendments, it is now established that these rights carry with them the right to be informed, that is educated, as to their existence and their manner of exercise. *Miranda* v. *Arizona*, 384 U.S. 436, 467-479 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964).[4]

Similarly, the existence of the other rights and liberties specifically guaranteed by the Constitution predicates the right to be sufficiently informed and educated to enjoy them. First Amendment rights particularly require for their effective exercise today a level of informational and educational maturity that few can obtain other than through formal schooling. As the district court put it in *Breen* v. *Kahl, supra*, at 704.

---

[4] In *Miranda* at 467-468 the court said specifically:

". . . to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . .

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise."

> "... to deny a 16 year old eleventh-grade male and a 17 year old twelfth-grade male access to a public high school in Wisconsin is to inflict upon each of them irreparable injury for which no remedy at law is adequate. I made this finding by taking notice of the social, economic, and psychological value and importance today of receiving a public education through twelfth grade."

It is unreasonable to assume that an expelled or suspended student can obtain this education and training in some alternative fashion. Cf. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (restrictions on use of educational facilities effectively prevent the learning of a profession). The deprivation of a person's right to attend school, therefore, carries with it the substantial risk of effectively depriving that person of specific constitutional liberaties. See *Dixon* v. ***Alabama State Board of Education***, 294 F.2d 150, 157 (5th Cir. 1961).

III. Since The Rights Asserted By Plaintiff In This Case Are Fundamental Ones, Neither Their Infringement Nor Their Unequal Allocation Can Be Justified Without Showing A Compelling State Interest

A. *The Action of the School Authorities Denies to Plaintiff The Equal Protection of the Laws.*

Whether we categorize the right involved as the right

of personal appearance and expression of personality or as the right to an education and to attend school, it is clear that it is fundamental and important. The equal protection clause of the Fourteenth Amendment prohibits a public institution from using classifications which circumscribe such a right except on a showing of "substantial justification." E.g., *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); See "Developments-Equal Protection" 82 Harv. L. Rev. 1065, 1120-1123, 1127-1131 and cases cited. Classifications which circumscribe or abridge one's rights to marry (*Loving* v. *Virginia*, 388 U.S. 1 [1967]), to vote (*Harper* v. *Virginia Board of Elections*, 383 U.S. 663 [1966]), to have offspring (*Skinner* v. *Oklahoma*, 316 U.S. 535 [1942]), and to travel (*Shapiro* v. *Thompson*, 394 U.S. 618 [1969]) have been subjected to this rigorous scrutiny.[5]

It should be noted that the rights to marry, to vote, to have offspring, and to travel are not rights expressly granted in the Constitution. Nevertheless, they are so fundamental to personal fulfillment in our society that any attempted abridgment by the state must be rigorously examined. Where fundamental rights such as these are at stake, the state must clearly demonstrate that the classification is supported by a compelling, legitimate and important state interest before it will be sustained. See cases cited above. So also here, rigorous scrutiny must accompany the state's attempt through the schools to prevent one class of persons—males with long hair—from appearing as they like.

The record in this case is devoid of any showing whatever that there is any legitimate interest of the state which supports this classification and justifies these deprivations of rights. Nor does appellant's brief advance any justification. And a statement that a pupil's expulsion is for the general benefit of the institution would be inadequate to save the classification. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). Nor is concern for the attitudes of other pupils sufficient. *Tinker* v. *Des Moines Indep. Commun. School Dist.*, 393 U.S. 503 (1969). There may be circumstances in the school (e.g., a machineshop class) where regulations with respect to hair length are appropriate. Such regulations must be sufficiently "tailored" to the circumstances, however, or they will be invalid. See *Shapiro* v. *Thompson, supra* at 1330; *Kramer* v. *Union Free School Dist., supra.* The justification for the different and unequal treatment here is patently insubstantial. *McLaughlin* v. *Florida, supra* at 191 and cases cited. It withholds a state service, formal education, from one class of students for no legitimate reason. See, *Baxstrom* v. *Herold*, 383 U.S. 107, 111; *Rinaldi* v. *Yeager*, 384 U.S. 305, 309-310 (1966). It further involves an important aspect of personal freedom. *Breen* v. *Kahl, supra*, (7th Cir. 1969). See *Skinner* v. *Oklahoma, supra* at 536 (protecting a "sensitive and important area of human rights"); *Griffin* v. *Tatum, supra* at 62.

---

[5] It is, of course, elementary that classifications based on race will be subjected to exacting scrutiny. *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). But such scrutiny is by no means limited to these cases.

B. *In any event, the State's Action Is Arbitrary and Unreasonable.*

Even were the rights involved in this case not fundamental, the classification could not stand because it is wholly irrational and arbitrary. *Levy* v. *Louisiana*, 391 U.S. 68, 72 (1967); *Turner* v. *Fouche*, — U.S. —, 38 Law Week 4090, 4094-95 (Jan. 19, 1970). There can be no doubt that a classification based solely on a preference for hair cut to a short length is irrational and a violation of the

Fourteenth Amendment. As was said in *Zachary* v. *Brown*, 299 F. Supp. 1360, 1362 (N.D. Ala., 1967):

> "The wide latitude permitted legislatures of the states and therefore the administrators of public colleges to classify students with respect to dress, appearance and behavior must be respected and preserved by the courts. However, the equal protection clause of the fourteenth amendment prohibits classification upon an unreasonable basis. This court is of the firm opinion that the classification of male students attending Jefferson State Junior College by their hair style is unreasonable and fails to pass constitutional muster.
>
> It needs to be emphasized that the defendants have not sought to justify such classification for moral and social reasons. The only reason stated upon the hearing of this case was their understandable personal dislike of long hair on men students. The requirement that these plaintiffs cut their hair to conform to normal or conventional styles is just as unreasonable as would palpably be a requirement that all male students of the college wear their hair down over their ears and collars."

As the court below noted in this case, there appears to be no motive for prohibiting long hair save the personal taste of the defendants. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886) ("no reason for it exists except hostility"). This motive is indeed palpably arbitrary, and incapable of sustaining a classification based upon it. Like the police conduct condemned in *Wright* v. *Georgia*, 373 U.S. 284 (1963) we have here simply the arbitrary assertion of official authority.

C. *The appellant offered no evidence that the appellee had himself disturbed the educational environment.*

The state's action violates the due process clause as well as being a denial of equal protection. When seeking to abrogate or diminish a basic personal freedom *the state* must demonstrate a substantial burden of justification. *Griswold* v. *Connecticut, supra; U. S.* v. *O'Brien*, 391 U.S. 367 (1968); *Shapiro* v. *Thompson, supra; Kramer* v. *Union Free School District, supra; Bates* v. *Little Rock, supra.* (1960). The "minimum rationality standard" test used in assessing the constitutionality of economic regulations cannot be and has never been the criterion in matters dealing with the personal freedom of an individual. To hold otherwise would deprive basic constitutional guarantees of any real meaning since the government seldom acts wholly irrationally. See Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424, 1448.

Here, defendant offered no evidence whatsoever that the appellee was either a disrupting or distractive influence at school. ***Tinker* v. *Des Moines Independent Community School District, supra.*** Even if evidence had been shown that other students were either districted or caused disturbances, such a showing would not be sufficient to meet the appellee's substantial burden. Hostility caused by others in response to the words, actions or, in this case, appearance of another, has never been sufficient grounds to deny the rights of the person against whom the hostility is directed. *Terminiello* v. *Chicago*, 237 U.S. 1 (1949); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Watson* v. *Memphis*, 373 U.S. 526 (1963); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Tinker* v. *Des Moines Independent Community School District, supra.* The fact that conforming students are distracted by the natural personal appearance of non-conforming students cannot, therefore, provide a basis for denying the right to be

a non-conformist. In order for any school administration even to begin to meet its burden of justification for denying a student's basic personal freedom, it must show that its primary function of educating all of its students has been substantially interrupted by the non-conforming students, to the measureable detriment of the student body, *and that no alternative means are readily available to deal with the situation.* Basic rights cannot be sacrificed on any lesser showing. *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *United States* v. *O'Brien, supra; Shapiro* v. *Thompson, supra; Kramer* v. *Union Free School District, supra; Tinker* v. *Des Moines Independent Community School District, supra; NAACP* v. *Alabama*, 377 U.S. 288 (1964).

Unlike regulation of dress or other regulations which are in many ways analogous, a regulation of the length of a student's hair has a direct and unavoidable consequence upon the life and liberty of the individual outside of school. It is impossible to cut one's hair for purposes of attendance at school and still wear one's hair at the length desired at home or at other places outside the school. To regulate the length of student's hair effectively means regulating student's hair at all places and at all times outside the school in direct violation of the wishes and rights of the students and their parents. *Breen* v. *Kahl, supra* (7th Cir. 1969); *Westley* v. *Rossi, supra.*

IV. THE ACTION OF THE APPELLEE, BEING BASED UPON HIS PERSONAL TASTE RATHER THAN UPON A NARROWLY DRAWN REGULATION, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The District Court advanced another ground for invalidating the suspension order: the lack of any specific regulation under which the principal suspended the plaintiff. Suspension is a serious sanction. The judge was plainly correct. This requirement of specificity is no less necessary when dealing with suspension or expulsion from school than when dealing with other forms of punishment. E.g., *Tinker* v. *Des Moines Independent School District, supra. Esteban* v. *Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969). Such a serious penalty requires that action be taken only under a precise regulation which clearly delimits the scope of authority. *Massachusetts Welfare Rights Organization* v. *Ott*, — F.2d — (1st Cir., No. 7392, decided Nov. 6, 1969.) This is not only because of the lack of fair notice but more important *to prevent the exercise of arbitrary* administrative action. "Vague standards, unless narrowed by interpretation, encourage erratic administration. . ." *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968); see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 90. Here, of course, the standards are not simply vague, they are totally lacking.

The unlimited discretion exercised in this case is apparent here in the following statement:

> "We take pride in the appearance of our students. Your dress reflects the quality of the school, of your conduct and of your school work.
>
> All students are expected to dress and groom themselves neatly in clothes that are suitable for school activities." (A. 33, Def. Ex. A)

The "reasons" given by the defendant are in fact simply an assertion by the school of unbridled discretion on sartorial matters, backed up by the power of suspension. *Wright* v. *Georgia, supra*. Whether or not the plaintiff has a basic personal right to choose his hair style, the arbitrary action of the defendant in punishing the plaintiff based upon a complete lack of standards would have to be prohibited as a denial of due process.

V. The District Court Did Not Err in Exercising Jurisdiction Over Plaintiffs' Claim Under the Civil Rights Act of 1871.

The defendant asserts that the District Court "erred in exercising jurisdiction over plaintiffs' claim under the Civil Rights Act." (Br. p. 18). Two grounds are advanced in support of this contention: first, that §1893 "does not apply to plaintiffs' hair style claim" (Br. pp. 18-22); and secondly, that "as a matter of sound discretion, [the court] should have deferred action on the complaint to the Massachusetts courts." (Br. p. 22). Neither contention has substance.

A. *Section 1983 Applies to This Type of Action.*

Defendant's contention that the Civil Rights Act, 42 U.S.C. §1983 does not apply to this type of action is without focus and exceedingly difficult to understand. In the beginning of his discussion, defendant apparently contends that since the Civil Rights Act was part of the Reconstruction Era legislation, it should be limited to claims by Negroes that they have been unconstitutionally discriminated against. (Br. p. 19). That argument is, of course, utterly without substance. As the District Court recognized, the precise scope of §1983 and of its jurisdictional counterpart, 28 U.S.C. §1343, is somewhat uncertain. The jurisdiction under §1343 has been utilized to enforce a whole range of constitutional rights having nothing to do with race. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 200, n. 19 (1962); *King v. Smith*, 392 U.S. 309, 312 n. 4 (1968); *Caperici v. Huntoon*, 397 F.2d 799 (1st Cir. 1968). 28 U.S.C. 1343 grants jurisdiction, and §1983 creates a remedy, for any substantial claim by the plaintiffs that state officers are denying constitutional rights which are not readily susceptible of monetary evaluation . .

The relevant authorities have been recently reviewed by Judge Friendly in *Eisen* v. *Eastman*, — F.2d — (2d Cir. Nov. 28, 1969, Docket No. 32909, CCH Poverty Law Reporter Par. 10,679).[6]

The confusion in defendant's brief is readily apparent. Much of their discussion on the point of lack of jurisdiction argues that no "jurisdiction" exists under 42 U.S.C. §1983. Plainly, this confuses questions of jurisdiction with those of substantive law. Section 1983 is not a jurisdictional statute; it provides a remedy for the deprivation by state officials of certain federal constitutional rights; The appropriate jurisdictional statute to enforce §1983 claims is 28 U.S.C. §1343. Defendant's claim that hair styling is not "a right, privilege, or immunity secured by the Constitution" (Br. p. 20) under §1983 is, therefore, an argument addressed to the merits of plaintiffs' claim, not to the jurisdiction of the District Court. *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

B. *The District Court Should Not Have Abstained.*

Defendant also contends that the District Court should have "deferred action on the complaint to the Massachusetts courts." (Br. p. 22). We assume that this is an abstention argument of some sort. It is interesting to note that the discussion does not raise any of the usual grounds of abstention; namely, that the state law is unclear and that a constitutional decision might be avoided by resorting to the state court to resolve an ambiguous issue of state law. Nor could defendant now raise this argument. First, the Supreme Judicial Court has already upheld the power of local school districts to make regulations of this character. *Leonard* v. *School of Attleboro*, 349 Mass. 704 (1965). Secondly, the whole abstention doctrine in the area of fundamental rights involving freedom of speech and rights of a similar nature has been substantially eroded, and has no applicability to situations where, as here, there is no reasonably apparent construction of a statute or regulation which would avoid the constitutional question. *Zwickler* v. *Koota*, 389 U.S. 241 249-50, (1967); *Healey* v. *Wise*, [illegible] F. Supp. 62, 65 (N.D. Ind. 1969) (three judge court). Finally, defendant made no argument for abstention in the trial court and accordingly cannot raise that defense here for the first time.[7] Abstention is clearly a doctrine of judicial discretion, not of jurisdiction. *Hostetter* v *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964).

As we indicated, however, defendant does not make a conventional abstention argument. Simply stated, their argument is that the District Court should have abstained because the Massachusetts courts can be counted on to enforce plaintiffs' constitutional rights, if any. (Br. pp. 22-27). That argument is far wide of the mark. It wholly misconceives the role of the federal courts in the enforcement of fundamental constitutional rights. The federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution." *Zwickler* v. *Koota*, *supra* at 247. italics in original) See Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 549-51. To say, therefore, that the state courts will enforce federal constitutional rights provides no basis for a conclusion that a case is improperly brought in the federal courts. *Zwickler* v. *Koota*, at 248. If it did, very few cases indeed could be prosecuted in the federal courts since it cannot be assumed that any state court will refuse to enforce federal constitutional claims. U.S. Const. Art. VI §2.

The short answer to defendant's argument is, therefore, that it misconceives the import of §1983. Under that section there is no requirement that a plaintiff exhaust his state administrative remedies before resorting to the federal court. *King* v. *Smith*, 392 U.S. 309, 312 n. 4. The same is true, *a fortiori*, with respect to state judicial remedies. *Monroe* v. *Pape*, 365 U.S. 167, squarely rejects defendant's argument:

---

[6] Despite defendant's attempt so to consider it, *Monroe* v. *Pape*, 365 U.S. 167 (1961) was not a racial discrimination case.

[7] Indeed, its answer concedes the existence of "jurisdiction". [illegible] D.I. Answer, par. [illegible]

> "It is no answer that State has a law which is enjoined would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be the first sought and refused before the federal one is revoked." (Id. at 183)

McNeese v. *Bd. of Education*, 373 U.S. 688, 672, and *Zwickler* v. *Koota*, *supra* at 248, reaffirm the principle. See also *Damico* v. *California*, 389 U.S. 416, 417 (1967). Not surprisingly, therefore, in *Breen* v. *Kahl*, *supra*, (7th Cir. 1969), the Court of Appeals considered the merits of a claim identical to that asserted here, without any doubt about its jurisdiction to do so. The District Courts have been unanimous in reaching the merits of the claims presented here. E.g., *Zachary* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969); *Westley* v. *Rossi*, *supra*.

CONCLUSION

The decision of the District Court should be sustained.

Respectfully submitted,

Robert Richards, Jr.
by his attorneys,
Daniel D. Levenson
Spencer Neth

John H. Henn

United States Court of Appeals
For the First Circuit

No. 7455.

ROBERT RICHARDS, JR.,
a minor by his father and next friend
ROBERT RICHARDS,
PLAINTIFF, APPELLEE,
v.
ROGER THURSTON,
as Principal of Marlboro High School,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges.*

David G. Hanrahan, with whom *William J. Brennan*, City Solicitor, *George A. McLaughlin, Jr.*, and *The McLaughlin Brothers* were on brief, for appellant.

Henry P. Monaghan, with whom *Daniel D. Levenson*, *Spencer Neth* and *John H. Henn* were on brief, for appellee.

Gerard F. Doherty, on brief for Massachusetts Secondary School Principals Association, amicus curiae.

April 28, 1970.

COFFIN, *Circuit Judge.* Plaintiff, a seventeen year old boy, was suspended from school at the beginning of his senior year because he refused to cut his hair, which a local newspaper story introduced into evidence described as "falling loosely about the shoulders". Defendant, the principal of the high school in Marlboro, Massachusetts, admits that there was no written school regulation governing hair length or style but contends that students and parents were aware that "unusually long hair" was not permitted.

On these sparse facts the parties submitted the case posed by plaintiff's request for injunctive relief against the deprivation of his rights under 42 U.S.C. § 1983. Each relied on the failure of the other to sustain his burden of proof, plaintiff claiming that he should prevail in the absence of evidence that his appearance had caused any disciplinary problems, and defendant maintaining that plaintiff had failed to carry his burden of showing either that a fundamental right had been infringed or that defendant had not been motivated by a legitimate school concern. The district court granted plaintiff's request for a permanent injunction and ordered plaintiff reinstated. *Richards* v. *Thurston,* 304 F. Supp. 449 (D. Mass. 1969).

Defendant, apart from his argument on the merits, insists that the district court erred in not abstaining pending consideration by the courts of the Commonwealth of Massachusetts. We are in entire sympathy with the proposition that questions involving school board authority ought to be resolved whenever possible on a nonconstitutional basis.[1] In this case, however, we agree with the district court that *Leonard* v. *School Committee of Attleboro,* 349 Mass. 704 (1965), a case containing similar facts, forecloses that nonconstitutional approach and clearly suggests that the courts of Massachusetts would have ruled against plaintiff on these facts.[2]

Plaintiff, too, advances a narrow argument for prevailing —the lack of any specific regulation authorizing suspension for unusual hair styles. We do not accept the opportunity. We take as given defendant's allegation in his answer that

---

[1] For a thoughtful discussion, *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. Pa. L. Rev. 373 (1969).

[2] *See Monroe* v. *Pape,* 365 U.S. 167, 183 (1961); *McNeese* v. *Board of Education,* 373 U.S. 668, 671-674 (1963).

parents and students—including plaintiff—were aware that unusually long hair was not permitted. Moreover, we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books.

Coming to the merits, we are aware of a thicket of recent cases concerning a student's wearing of long hair in a public high school.[3] While several of the decisions holding against the student have relied on the prior occurrence of disruptions caused by unusual hair styles,[4] we think it fair to say that many of those courts would hold against the student on a barren record such as ours, on the grounds that the student had not demonstrated the importance of the right he asserts. On the other hand, in few of the cases holding for the student was there any evidence of prior disruptions caused by hair styles. Despite the obvious disagreement over the proper analytical framework, each of the "pro-hair" courts held explicitly or implicitly that the school authorities failed to carry their burden of justifying the regulation against long hair.

---

[3] Decisions holding against the student include the following: *Ferrell* v. *Dallas Independent School District,* 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968); *Davis* v. *Firment,* 269 F. Supp. 524 (E.D. La. 1967), *aff'd,* 408 F.2d 1085 (5th Cir. 1969); *Crews* v. *Clones,* 303 F. Supp. 1370 (S.D. Ind. 1969); *Brick* v. *Board of Education,* 305 F. Supp. 1316 (D. Colo. 1969); *Stevenson* v. *Wheeler County Board of Education,* 306 F. Supp. 97 (S.D. Ga. 1969) (mustaches); *Akin* v. *Board of Education,* 262 Cal. App. 187 (1968); *Neuhaus* v. *Torrey,* 38 U.S.L.W. 2516 (N.D. Cal., March 10, 1970); and *Leonard* v. *School Committee of Attleboro, supra.* Several decisions gave considerable weight to the evidence of prior disruptions of the school atmosphere caused by unusual hair styles. *E.g., Ferrell, Davis, Brick.* The *Crews* decision relied on the fact of prior disruptions concerning the particular plaintiff there involved.

Ranged against these authorities are the following cases holding for the student: *Finot* v. *Pasadena City Board of Education,* 58 Cal. Rptr. 520 (Cal. App. 1967) (First Amendment); *Meyers* v. *Arcata Union High School District,* 75 Cal. Rptr. 68, 72-73 (Cal. App. 1969) (First Amendment); *Sims* v. *Colfax Community School District,* 307 F. Supp. 485 (S.D. Iowa 1970) (Due Process Clause protects female student's long hair); *Breen* v. *Kahl,* 296 F. Supp. 702 (W.D. Wis. 1969) (Due Process Clause), *aff'd,* 419 F.2d 1034 (7th Cir. 1969); ("penumbra" of First Amendment or Ninth Amendment); *Calbillo* v. *San Jacinto Junior College,* 305 F. Supp. 857 (S.D. Tex. 1969) (Equal Protection Clause in a junior college context); *Zachry* v. *Brown,* 299 F. Supp. 1360 (N.D. Ala. 1967) (Equal Protection Clause); *Griffin* v. *Tatum,* 300 F. Supp. 60 (M.D. Ala. 1969) (Equal Protection Clause and Due Process Clause); *Westley* v. *Rossi,* 305 F. Supp. 706 (D. Minn. 1969) (same).

In *Farrell* v. *Smith,* F. Supp. (D. Me. 1970), the court explicitly accepted the proposition that the right to wear one's hair at any length is an aspect of personal liberty protected by the Due Process Clause of the Fourteenth Amendment, following the "pro-hair" cases cited above. However, the court on the facts before it held that the state vocational school had met its substantial burden of justification by a showing that neatness of appearance enhanced the employment opportunities of its students.

What appears superficially as a dispute over which side has the burden of persuasion is, however, a very fundamental dispute over the extent to which the Constitution protects such uniquely personal aspects of one's life as the length of his hair, for the view one takes of the constitutional basis—if any—for the right asserted may foreshadow both the placement and weight of the evidentiary burden which he imposes on the parties before him. For this reason, we resist the understandable temptation, when one is not the final arbiter of so basic a constitutional issue, to proceed directly to an application of the constitutional doctrine without attempting to ascertain its source as precisely as possible.

It is perhaps an easier task to say what theories we think do *not* apply here. We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality. However, we reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507-508 (1969); *see Cowgill* v. *California*, 396 U.S. 371 (1970), Harlan, J. concurring; *cf. Close* v. *Lederle*, F.2d (1st Cir. 1970), filed this date. That protection extends to a broad panoply of methods of expression, but as the non-verbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote. Nor do we see the logic of expanding the right of marital privacy identified in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), into a right to go public as one pleases.[5]

Our rejection of those constitutional protections in this case is not intended to denigrate the understandable desire of people to be let alone in the governance of those activities which may be deemed uniquely personal. As we discuss below, we believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests.[6]

The idea that there are substantive rights protected by the "liberty" assurance of the Due Process Clause is almost too well established to require discussion. Many of the cases have involved rights expressly guaranteed by one or more of the first eight Amendments.[7] But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the Court to preclude the existence of other substantive rights implicit in the "liberty" assurance of the Due Process Clause. In the 1920's the Court held that such "liberty" includes the right of parents to send their children to private schools as well as public schools and to have their children taught the German language. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390, 399-400 (1923). In 1958, the Court held that "the right to travel [to a foreign country] is a party of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958); followed in *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505-506 (1964). More recently, the Court, without specifically ascribing its source, established the right to travel interstate as a right fundamental to our Federal Union despite the absence of any specific mention thereof in the Constitution. *United States* v. *Guest,* 383 U.S. 745, 757, 759 (1966); *Shapiro* v. *Thompson,* 394 U.S. 618, 629-631 (1969). Such a right of interstate travel being more inherent in and essential to a Federal Union than the right to travel abroad established in *Kent* and *Aptheker,*[8] we can only conclude that such right must a fortiori be an aspect of the "liberty" assured by the Due Process Clause.

---

[4] *See also* two Fifth Circuit "freedom button" cases expressly differentiated because of the disruptive response to the plaintiffs in the latter case which had not occurred in the former: *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966), and *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

[5] That "privacy" has not been generally understood in the latter sense is indicated by the definition of privacy given by Alan F. Westin in his wide-ranging book *Privacy and Freedom*, (1967), at p. 7: "Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

[6] The fact that the "liberty" protected by the *Due Process Clause* includes such a sphere of personal liberty does *not* require the state to provide a special forum for the exercise of such personal liberty. Moreover, having provided a forum, the state may revoke it when the exercise of personal liberty becomes inimical to the societal interests affected by such use of the state's forum. *Cf., Close* v. *Lederle*, *supra*. Of course, when the activity takes on the coloration of a First Amendment right, only a more compelling interest will justify a limitation on such activity. *United States* v. *O'Brien*, *supra* at 376-377.

We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty"

assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. As the Court stated in *Union Pacific Railway Co.* v. *Botsford,* 141 U.S. 250, 251 (1891):

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right of one's person may be said to be a right of complete immunity: to be let alone.' "[9]

Indeed, a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.[10]

We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.[11] The debate concerning the First Amendment is illuminating. The specification of the right of assembly was deemed mere surplusage by some, on the grounds that the government had no more power to restrict assembly than it did to tell a man to wear a hat or when to get up in the morning. The response by Page of Virginia pointed out that even those "trivial" rights had been known to have been impaired—to the Colonists' consternation—but that the right of assembly ought to be specified since it was so basic to other rights.[12] The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance.[13] We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes.

---

[7] *See e.g., Schneider* v. *United States,* 308 U.S. 147, 160 (1939); *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-305 (1940); *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958); *Railroad Trainmen* v. *Virginia Bar,* 377 U.S. 1 (1964).

[8] *See* discussion in *Guest, supra,* and *Shapiro, supra,* and *see* Stewart, J. concurring in *Shapiro* at 642-643.

[9] In more recent cases, the Court has weighed this right to the control over one's own person against the state interest underlying the state's intrusion. *Rockin* v. *California,* 342 U.S. 165, 172 (1952); *Breithaupt* v. *Abram,* 352 U.S. 432, 439 (1957); *cf. Schmerber* v. *California,* 384 U.S. 757 (1966).

[10] *See* W. and A. Durant, *The Story of Civilization: Part VIII, The Age of Louis XIV,* 396-410 (1963) (account of Peter the Great's proscription of beards).

[11] Redlich, "Are There 'Certain Rights . . . Retained By The People'?", 37 N.Y.U.L. Rev. 787, 804-812 (1963).

Determining that a personal liberty is involved answers only the first of two questions. The second is whether there is an outweighing state interest justifying the intrusion. The answer to this question must take into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served. For example, the right to appear au naturel at home is relinquished when one sets foot on a public sidewalk. Equally obvious, the very nature of public school education requires limitations on one's personal liberty in order for the learning process to proceed. Finally, a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year. *See Westley v. Rossi*, 305 F. Supp. at 713-714.

Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.

In the absence of an inherent, self-evident justification on the face of the rule, we conclude that the burden was on the defendant. Since he offered no justification, the judgment of the district court must be affirmed.

Affirmed.

---

[12] This exchange is reported and discussed in Irving Brant's *The Bill of Rights*, 53-67 (1965). As the author there points out, the reference to the wearing of hats had considerable meaning to the participants of the debates, recalling William Penn's trial for disturbing the peace. Upon entering the courtroom bareheaded, Penn was directed by a court officer to don his hat, after which he was fined by the court for not doffing his hat.

[13] Remarks of James Madison, reported and discussed in Redlich article cited in n. 10 *supra*.

Adm. Office U. S. Courts — Blanchard Press, Inc., Boston, Mass.

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother
and natural guardian,
HURLEY JONES, on behalf of
himself and all others similarly
situated,

Plaintiff

vs.

EDWARD GILLESPIE, principal
of Strawberry Mansion Junior
High School, on behalf of himself
and all other school principals
in the School District of
Philadelphia and THE SCHOOL
DISTRICT OF PHILADELPHIA,

Defendants

FEBRUARY TERM, 1970

NO. 4198

TRIAL DIVISION

COMPLAINT IN EQUITY

1. Plaintiff is Lewis Jones, a minor, 15 years of age, residing with his mother, Hurley Jones, at 2012 N. 22nd Street, Philadelphia, Pennsylvania; plaintiff brings this action by his mother, on his own behalf and on behalf of all other students in the School District of Philadelphia.

2. The students in the School District of Philadelphia nunber approximately 290,000 and therefore constitute a class so numerous as to make it impracticable to join them all as parties plaintiff, and plaintiff will adequately represent their interest.

3. Defendant Edward Gillespie is principal of the Strawberry Mansion Junior High School, with offices in the school at Ridge and Susquehanna Avenues in Philadelphia, Pennsylvania; defendant Gillespie is sued as principal of the Strawberry Mansion Junior High School and as representative of the class of all school principals in the School District of Philadelphia.

4. The principals in the School District of Philadelphia number approximately 267 and therefore constitute a class so numerous as to make it impracticable to join them all as parties defendant, and defendant Gillespie will adequately represent their interest.

5. Defendant School District of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania, with offices at 21st and the Parkway, Philadelphia, Pennsylvania.

6. Plaintiff Jones was a ninth grade student at Strawberry Mansion Junior High School until January 28, 1970, when he was suspended from school by defendant Gillespie.

7. Plaintiff Jones was remained suspended from January 28, 1970, to date, without ever having received any form of hearing whatsoever, and he has not been advised of any date upon which he will be re-admitted to school.

8. On January 19, 1970, defendant Gillespie advised plaintiff's counsel that plaintiff could return to school only upon condition that he not attend classes and remain in defendant Gillespie's office.

9. Plaintiff's suspension without a hearing, as aforesaid, violates plaintiff's rights under: Section 1318 of the School Code, 24 P.S. section 1318; (b) the Local Agency Law, 53 P.S. Section 11301 et seq.; (c) the Fourteenth Amendment to the United States Constitution.

10. It is a widespread invidious practice among class defendants to suspend class plaintiffs longer than temporarily without affording class plaintiffs any form of hearing or taking steps to permit the School Board of the School District of Philadelphia to afford them a hearing, all in violation of class plaintiffs' rights under aforesaid

laws. Class defendants will continue to violate class plaintiffs' rights as aforesaid unless restrained by this Court.

11. Despite knowledge of the aforesaid practice of class defendants, defendant School District of Philadelphia has failed or refused to take action, by regulation or otherwise, to end the unlawful suspensions and enforce and protect the rights of class plaintiffs under the laws set forth above.

12. Plaintiff and class plaintiffs have no adequate remedy at law.

13. Plaintiff and class plaintiffs are suffering and will continue to suffer irreparable harm from the practices complained of.

WHEREFORE, plaintiff and class plaintiffs, being without adequate remedy at law, and being in need of immediate relief, pray your Honorable Court for the following relief:

(a) That defendant School District of Philadelphia and defendant Gillespie be preliminarily and permanently enjoined from preventing plaintiff Jones from attending Strawberry Mansion Junior High School, unless and until the Philadelphia School Board or a duly authorized committee thereof decides to expel or suspend plaintiff from Strawberry Mansion Junior High School after a proper hearing;

(b) That defendant Gillespie and class defendants be preliminarily and permanently enjoined from suspending class plaintiffs for periods in excess of five days unless such longer suspension is authorized by the Philadelphia School Board or a committee thereof after proper notice and hearing.

(c) That defendant School District of Philadelphia be preliminarily and permanently ordered to take whatever action, by promulgation of regulations or otherwise, is necessary to enforce and protect the rights of class plaintiffs to a hearing before suspension in excess of five days;

(d) That plaintiff be awarded his costs in this action;

(e) That plaintiff and class plaintiffs be awarded such other and further relief as is necessary and appropriate.

s/____________________
DANIEL E. FARMER

s/____________________
MARTHA K. TREESE

s/____________________
CHARLES H. BARON

DATE____________________

s/____________________
HARVEY N. SCHMIDT

IN THE COURT OF COMMON PLEAS
FOR THE COUNTRY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated,	FEBRUARY TERM, 1970
Plaintiff	
vs.	
EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School, on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,	NO. 4198 IN EQUITY
Defendants	

INTERROGATORIES TO DEFENDANT SCHOOL DISTRICT

Plaintiff propounds the following interrogatories to defendant Philadelphia School District, to be answered by Mark R. Shedd personally and under oath on the basis of his personal knowledge or on the basis of personal knowledge of employees of defendant Philadelphia School District or on the basis of information otherwise available (as hereinafter defined) to defendant Philadelphia School District.

These interrogatories are continuing, and supplementary answers are to be filed upon discovery of information which renders the prior answers substantially inaccurate, incomplete or untrue.

Those interrogatories calling for statistical information are to be answered for the most recent academic year for which such information is available (stating the year in the answer). "Available," as used in these interrogatories and the preamble thereto, means computable, compilable, inferable, or otherwise obtainable.

In addition to their meanings in ordinary English usage, the following terms used herein have the following further specific meanings:

Identify - state each of the following where available: title, author, names of sender and recipient, date of communication or delivery, present place of custody, name and address of present custodian, and form number.

Transfer - the transfer other than upon request, of a student, his parent or guardian, of attendance from the student's present school to attendance at any other school including transfer to a disciplinary school.

Disciplinary School - Daniel Boone, Oliver P. Cornman, or Octavius Catto schools.

School - a school of the Philadelphia School District.

District - except as otherwise indicated, one of the eight numbered, non-statutory sub-districts of the Philadelphia School District.

School District - except as otherwise indicated, the Philadelphia School District, including the political entity named, the Board of the Philadelphia School District, and any employee of the Philadelphia School District.

Document - any writing or recording of any kind, whether handwritten, typed or printed, including but not limited to: letters, memoranda, bulletins, resolutions, books, computer print-outs, papers, pamphlets, notebooks, recording tapes, discs and wires.

Suspension - every non-permanent exclusion of a student from school attendance by action of a School District employee, of whatever duration, and whether terminated by readmission, admission to another school, admission to a disciplinary school or otherwise.

1. State the number of students suspended from each Junior High School and High School, categorizing them as to duration into suspensions of:

   a) less than five days,

   b) more than five days but less than ten days,

   c) more than ten days but less than fifteen days,

   d) more than fifteen days.

2. State, for each Junior High School and High School, the ways in which suspensions terminate and state the number of suspensions terminated in each such category.

3. For each Junior High School and High School, state the number of students in each of the following categories:

   a) Transferred to another school,

   b) Expelled for misconduct,

   c) Expelled for reasons other than misconduct, stating such reason,

   d) Transferred to a disciplinary school,

   e) Any other transfer or exclusion from attendance.

4. State the information requested in the foregoing interrogatories sor Negro students alone.

5. State the number of suspension, expulsion or transfer hearings held before the School Board of defendant School District or a committee

thereof, and describe the procedures followed in such hearings.

6. State the number of suspension, expulsion or transfer hearings in which the presiding School District employee was a principal, and describe the procedures followed in such hearings.

7. State the number of suspension, expulsion or transfer hearings in which the presiding School District employee was a district superintendent, and describe the procedures followed in such hearings.

8. State the number of suspension, expulsion and transfer hearings in which the presiding School District employee was someone other than the School Board of defendant School District, a committee thereof, a principal or a district superintendent; state who presided, and describe the procedures followed in such hearings.

9. Identify and quote verbatim or attach the relevant sections of all documents promulgated by the School District and currently in force, governing procedures in expulsions, suspensions and disciplinary transfers.

10. State to whom are distributed any documents identified in answer to interrogatory number 9.

11. Identify all documents prepared by defendant School district containing regulations or administrative directives governing procedures in suspensions, expulsions or disciplinary transfers which have not been promulgated; quote verbatim or attach the relevant sections thereof and state why such regulations or directives were not promulgated.

12. State the number of times it has come to the attention of the Office of Legal Affairs, the Office of the Philadelphia District Superintendent, or the Office of Pupil Personnel and Counseling that principals or

district superintendents were not following the applicable law, regulations or administration directives governing suspensions, expulsions or disciplinary transfers.

13. State what measures have been taken by defendant School District to insure compliance by principals and district superintendents with the law, regulations, and administrative directives concerning suspensions, expulsions and disciplinary transfers.

14. Identify every document containing any information relevant to answering the foregoing interrogatories.

15. Identify the documents used in processing suspensions, expulsions or transfers.

16. State whether any alternative education is provided suspended students, and if so, describe such education fully, including but not limited to:

   a) number of persons to whom provided,
   b) criteria for eligibility,
   c) curricula.

17. Should objections be sustained to any interrogatory herein on the ground that it calls for excessively burdensome investigation, computation or compilation of information, state, for each such objection, the sources from which the information sought may be derived by plaintiff and identify any relevant documents.

Date:______________________

____
DANIEL E. FARMER

____
MARTHA K. TREESE

____
CHARLES H. BARON

Counsel for Plaintiff

COMMUNITY LEGAL SERVICES, INC.
313 South Juniper Street
Philadelphia, Penna. 19107

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated,	FEBRUARY TERM, 1970 NO. 4198 IN EQUITY
Plaintiff	
vs.	
EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,	
Defendants	

STATEMENT OF THE CASE

Plaintiff Lewis Jones was a ninth grade student at Strawberry Mansion Junior High School until his suspension on January 28, 1970, by the principal of Strawberry Mansion, defendant Edward Gillespie, on the ground that he allegedly took a ten cent box of cookies from a fellow student.

Plaintiff's mother was informed on February 5, 1970, that her son would not be then readmitted to Strawberry Mansion, but would remain suspended pending further consideration of the case. Plaintiff has not had a hearing before the School Board of the Philadelphia School District and remains suspended to date.

Lewis Jones' plight is reflective of a widespread practice among class defendants to arbitrarily suspend students without hearings and keep them suspended without hearings for substantial periods of time at their pleasure. Defendant School District, with full knowledge of this routine deprivation of students' rights, looks on and does nothing.

ARGUMENT

I. DUE PROCESS REQUIRES A HEARING BEFORE SUSPENSION EXCEPT IN EXCEPTIONAL EMERGENCY SITUATIONS IN WHICH HEARING MAY BE PROVIDED AFTER SUSPENSION.

Due process requires a hearing whenever substantial rights of individuals are affected by government action. The Supreme Court held in Armstrong v. Manzo, 380 U.S. 545, 552 (1945), that a hearing "must be granted at a meaningful time and in a meaningful manner." In the absence of compelling circumstances, this means that the hearing must be afforded before the deprivation occurs. The Court has upheld the right to a hearing before essential interests are disturbed by state action in a variety of situations. Armstrong v. Manzo, supra (deprivation of parenthood); Cole v. Young, 351 U.S. 536 (1956) (dismissal from employment); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (accountant's qualifications to practice before the Board of Tax Appeals); Slochower v. Bd. of Bar Examiners, 353 U.S. 232 (1957) (right to take bar examination); Snaidach v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment).

Education is one of the most vital rights of an individual. As the Supreme Court recognized in Brown v. Board of Education, 347 U.S. 483 (1954):

> Today, education is perhaps the most important function of state and local governments,...In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

So important does the state deem education, that it is not only a right, but a compulsory requirement. 24 P.S. Section 13-1327.

It is clear therefore that any deprivation of state guaranteed and state required education must be consonant with due process. This proposition is well established. *Dixon v. Alabama St. Board of Education*, 294 F. 2d 150 (5th Cir.), *cert. denied* 368 U.S. 930 (1961), is the leading case extending the right of a hearing to students expelled from a University. The Court held that education was so essential that a hearing was constitutionally required before they could be so deprived. *Accord*, *e.g.*, *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961) and *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo, 1967).

Suspension is a deprivation of a student's rights with the same necessity of protection as expulsion. In *Stricklin v. Regents of University of Wisconsin* 297 F. Supp. 416 (W.D. Wisc. 1968), plaintiffs sought a temporary restraining order for their immediate reinstatement as students. The plaintiffs had been suspended because they had engaged in and incited acts of violence on campus which constituted large-scale riots. The plaintiffs were temporarily suspended pending a full hearing on further disciplinary action to be held 13 days later because university officials reasonably concluded that the students' continued presence would lead to further violence. Nevertheless the Court ordered the reinstatement of the students, for it concluded that due process required a preliminary hearing before even a temporary suspension, where no impossibility or unreasonable burden in holding such a preliminary hearing was shown.

The due process requirement of a prior hearing applies to school as well as college disciplinary actions. An individual's interest in receiving an elementary and secondary education is more essential than in receiving a college education, for without such education, an individual cannot survive in society.* In Woods v. Wright, 334 F. 2d 369 (5th Cir. 1964), the Court made no distinction between high school and college students. The Court granted a temporary restraining order to reinstate high school students who had been suspended without a hearing several days before the end of school. The shortness of time before the end of school and the availability of summer school were not exigencies enough to justify abrogation of the students' right to a hearing prior to suspension.

Students, therefore, have a vital interest in securing an education which must be protected from arbitrary action by government officials. To protect this interest, a hearing must be held before their education can be disrupted.

II. WHERE AN EMERGENCY JUSTIFIES SUSPENSION PRIOR TO A HEARING, DUE PROCESS REQUIRES A HEARING AS SOON AS PRACTICABLE AFTER SUSPENSION.

It has been recognized that due process permits state deprivation of rights prior to a hearing in the face of grave and immediate threat of serious injury to persons or property. Accordingly, suspension before hearing could conceivably be justified by extremely disruptive or dangerous behavior. The exception, however, is a narrow one, for the right abridged is elemental in our system of justice. Thus, Sticklin v. Regents of the University of Wisc., supra., held unconstitutional a 13 day temporary suspension without a prior hearing even though the Court assumed the truth of defendant's contention disorder and riot were threatened.

---

*Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969), for example, recognized that school children have the full protection of the first amendment as against action by school officials.

III. TO ESCAPE CONSTITUTIONAL INVALIDITY SECTION 1318 OF THE SCHOOL CODE MUST BE CONSTRUED AS AUTHORIZING SUSPENSIONS BEFORE HEARINGS ONLY IN EMERGENCIES AND AS REQUIRING A HEARING WITHIN FIVE DAYS AFTER SUCH SUSPENSIONS.

Section 1318 of the Public School Code, 24 P.S. Section 13-1318, provides:

> Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent, supervising principal, or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him. Such hearing, suspension, or expulsion may be delegated to a duly authorized committee of the board.*

---

*The district superintendent and supervising principal referred to are not officials of the numbered sub-districts of the Philadelphia School District, but are officials of the whole district. 24 P.S. Section 10-1071. Dr. Mark Shedd is both District Superintendent and Secretary of the School Board. There is no "Supervising Principal."

This statute must be construed so as to conform to the constitutional requirements of due process. Since due process requires a hearing before suspension, the statute can only be consistent if it is considered as authorizing summary suspensions only in cases of emergency.

If a student must be summarily suspended, then a hearing must be conducted as soon as it is reasonable to convene a hearing committee. Since the statute authorizes a hearing before a committee of the School Board, a committee of one member of the School Board could hold the hearing almost immediately. Certainly, five days is more than adequate.

Moreover, the purpose of the statute will be defeated if the student remains suspended for a substantial period of time, for the reinstated student will suffer an unjust academic penalty due to his absence from class. Absence for longer than five days gravely impairs academic standing.

Section 3214 (6) of the New York School Law governs suspensions and establishes a five day maximum suspension without a hearing.

> Section 3214. School for delinquents
>
> 6. Suspension of a minor. a. The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:
> (1) A minor who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others;
> (2) A minor whose physical or mental conditions endangers the health, safety, or morals of himself or of other minors;
> (3) A minor who, as determined in accordance with the provisions of part one of this article, is feebleminded to the extent that he cannot benefit from instruction.

> b. The board of education, board of trustees, or sole trustee may adopt by-laws delegating to the principal of the district, or the principal of the school where the pupil attends, the power to suspend a minor for a period not to exceed five school days.
> c. No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil. Such hearing shall be held before the superintendent of schools if the suspension was ordered by him. An appeal to the board of education shall lie from his decision upon such hearing. If the suspension shall have been ordered by the board of education, such hearing shall be before such board.*

New York City, with a school population three times that of Philadelphia's, has, in compliance with the statute, developed hearing procedures for suspension cases. Administrative burden cannot, therefore, justify a longer emergency suspension before hearing for Philadelphia.

IV. PLAINTIFF'S AND CLASS PLAINTIFFS' RIGHTS HAVE BEEN VIOLATED BY SUSPENSIONS WITHOUT HEARINGS IN NON-EMERGENCY SITUATIONS AND BY SUSPENSIONS EXCEEDING FIVE DAYS IN EMERGENCY SITUATIONS WITHOUT SUBSEQUENT HEARINGS.

It has been established that due process requires a hearing prior to suspension except in grave emergencies and then a hearing must be provided as soon as practicable. It has further been established that five days is an appropriate maximum.

The individual plaintiff in this case must be reinstated in school. His suspension was not valid as an emergency summary suspension since the principal, defendant Gillespie, could not reasonably regard his conduct as posing a grave and immediate threat to persons or property.

---

*Section 3214 covers the provision for disciplinary schools as well as suspension, hence its title.

However, even assuming, arguendo, that the initial suspension was valid, his continuing suspension violates due process. The four weeks that the plaintiff has been suspended clearly exceeds any reasonable length of time necessary to afford him a hearing.

Class defendants have made a practice of violating the due process rights of class plaintiffs. Suspensions are routinely made without prior hearings in non-emergency situations, and in those few cases where an emergency does justify summary suspension, the notice required under section of 1318 to permit convening a hearing committee of the School Board is not given, and hearings are not held promptly, if at all.

Defendant School District, with full knowledge of these practices, has done nothing to protect the rights of its students against class defendants' unconstitutional practices, and, indeed, defendant School District has failed to adopt regulations drafted by its counsel in an attempt to cure the lawlessness of class defendants.

CONCLUSION

The Court's decision will have a profound effect on the rights of students in the Philadelphia School System. Our educational system should set an example by which students learn to respect legal procedures and justice. This cannot be accomplished when the system itself acts arbitrarily instead of insuring just and fair treatment to all students. For the reasons stated herein, plaintiff should be reinstated in Strawberry Mansion Junior High; and he and class plaintiffs should be protected against future suspensions without a prior hearing except in emergency situations. To insure these rights, the school district must be ordered to take measures to protect class plaintiffs' rights.

All of which is respectfully submitted.

DANIEL E. FARMER, ESQ.

MARTHA K. TREESE, ESQ.

February 26, 1970

CHARLES H. BARON, ESQ.

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated,

Plaintiff

vs.

EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School, on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,

Defendants

FEBRUARY TERM, 1970

NO. 4198

ORDER

AND NOW, April 22, 1970, pursuant to the within consent of the parties it is hereby ORDERED and DECREED that:

1. Defendants, their agents, employees, and all others acting in concert with them, are hereby enjoined from suspending any student in the School District of Philadelphia from school attendance for a period longer than five days unless such longer suspension is authorized by the School Board of defendant School District or a committee thereof after proper hearing. A suspension shall not be deemed to exceed five days where a suspended student has been notified to return to school before five days but fails to do so through no fault of defendants.

2. In furtherance of this decree, defendant School District shall establish, by written regulations, effective procedures to ensure conformity to the aforesaid provisions of this decree, and defendant School District shall, in the preparation of such regulations, consider matters including but not limited to: formation of the hearing committee, notice by the principal to the committee, time, place, notice to the student, right to counsel, evidence to be considered, form of hearing and appeals therefrom, and consequences of failure to hold a hearing within five days. Such regulations shall be effective no later than September 30, 1970.

J. LEVIN J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

LOIS OWENS, ET AL.)
)
VS) CIVIL ACTION NO. 69-1186
)
BERNARD DEVLIN, ET AL)
)
)

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

This case involves the discharge by the defendant Devlin from a predominately white public school of four black girls who have attended that school under the open enrollment policy promulgated by the defendant Boston School Committee. The girls have participated in the open enrollment plan for periods ranging from approximately three months to four and one-half years.

The plaintiffs deny involvement in the incident which allegedly resulted in their discharge from the Taft School. The girls were discharged without notice of the specific charges and without the right to confront the witnesses against them. No hearing was held to resolve the factual dispute.

The defendants respond to the plaintiffs' contention that the manner of their discharge denies them due process of law under the Fourteenth Amendment by saying that "conduct" is a condition of the "privilege" to attend an out-of-district school. The defendants assert that under the open enrollment policy a principal has the authority to withdraw this privilege, acting solely within his discretion and without reference to any standards, a hearing, or any right to review of the principal's decision.

The plaintiffs note that the defendants have applied to them disciplinary rules and procedures different from those applied to students whose parents reside within the geographic attendance zone for the Taft School. The plaintiffs contend that this is an arbitrary and capricious classification which denies them the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs also maintain that terming attendance at a public school a "privilege" does not deprive them of the protection of the Due Process Clause. The plaintiffs further assert that the use of "conduct" as a standard for the imposition of serious disciplinary sanctions denies them due process of law in that "conduct" is vague and overbroad, vests an adjudicatory official with unfettered discretion, and chills their First Amendment rights of free speech and association.

THE POLICY OF THE DEFENDANTS, BY WHICH THE WAY A STUDENT IS DISCIPLINED DEPENDS IN THEORY ON WHERE HE LIVES AND IN PRACTICE ON HIS RACE, DENIES THE PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. THE DISTINCTION IS UNCONSTITUTIONAL EVEN IF REGARDED AS PURELY GEOGRAPHICAL.

The plaintiffs live outside the geographical district of the Taft Senior High School but attend that school under the Open Enrollment Policy of the Boston School Committee. They, together with all other students transferring to another district within the City of Boston,* are exposed to a discipline which the defendants do not apply equally to students living in their school's geographical district. The disparity in treatment takes at least three forms.

First, the standard of behavior imposed upon transfer students is vaguer and more severe. Section 215(3) of the Boston School Committee Regulations states that a student may be suspended from school for (a) "violent or pointed opposition to authority" or (b) "continued or flagrant violations of school discipline and good behavior." The defendants assert that this provision applies only to students who reside within the geographic district of the school which they attend.

---

*No question is here presented involving attendance at schools not within the jurisdiction of the Boston School Committee.

They contend that transfer stddents attending a school under the Open Enrollment Plan do so as a "privilege" for which "conduct"is a "condition." On this basis they claim the right to impose, on such students alone, sanctions of all types--including suspension or total exclusion from the school which they have been attending--for breaches of "conduct." "Conduct" thus is in effect an omnibus standard applied only to transfer students, who are thereby denied the protection of Section 215(3).

The plaintiffs will show that"conduct" is interpreted by the responsible official to include "attitude," a term apparently defined largely in terms of the thinking and expression of improper thoughts. Without granting that the standards of behavior embodied in Section 215(3) are specific enough to comport with the requirements of due process of law, it may be observed that that section at least makes it clear that a resident student may be suspended only if his behavior presents either a severe or a repeated problem. A resident student may not be suspended for "attitude" or for isolated infractions requiring minor disciplinary action. And it must be remembered, entirely apart from the fact that the allegations of misconduct against the plaintiffs are vague and unproven, that they are at most charged with having "escorted" Brighton High School students into their school.

See, Hornsby v. Allen, 326 F. 2d 605 (5th Cir., 1964) (liquor license); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (practice of law); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1927) (practice as an accountant); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (practice of law).

D. SOCIAL SECURITY

Social Security benefits were traditionally regarded as a benefit upon which the government could place any condition. The Supreme Court eliminated this notion in Sherbert v. Verner, 374 U.S. 398, 404 (1963), when it stated:

> It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

E. WELFARE *

The last bastion of the right-piivilege distinction has been in the area of public welfare. Numerous recent cases which have held the one year welfare residency requirement unconstitutional have discarded the right-privilege distinction. This court, in Robertson v. Ott, 284 F. Supp. 735 (D. Mass., 1968), summarily noted:

> Defendants submit in their brief that "no individual has a constitutionally protected right to AFDC or any other kind of welfare payments." Although the court may agree, it does not follow that a state may arbitrarily discriminate in making gratuitous welfare payments. cf. Sherbert v. Verner, 1963, 374 U.S. 398, 404, 83 Sup. Ct. 1790, 10 L. Ed. 2d 965, id. at 373

In Smith v. Reynolds, 277 F. Supp. 65, 67 (E.D. Penn. 1967), probable jurisdiction noted, 390 U.S. 940 (1968), the court similarly stated:

*See also Goldberg v. Kelly, 38 U.S.L.W. 4223, March 23, 1970

Second, transfer students may be permanently excluded from their school by an official who has no power so to exclude resident students. Section 215(3), which the defendants apply only to resident students, states that a principal may suspend a student for three school days; that a principal so doing must forthwith schedule a conference with the student's parents; and that if the student is not reinstated within three school days the matter must be referred to the Superintendent. Thus under that regulation suspension for more that three days requires the action of two officials--the principal and the Superintendent.

The defendants contend that for transfer students no referral to the superintendent is required. They would instead vest the principal with complete authority to impose whatever disciplinary sanctions he deems suitable, including the permanent exclusion of a child from his school by the expedient of a forced transfer.*

Third, there is imposed on transfer students a different and more stringent sanction than that which is placed on resident students. It appears that the Superintendent may, under Section 215(3), extend the suspension of a resident student beyond three school days.

---

*The plaintiffs do not understand the defendants' position to be that the principal may exclude a child from all public schools.

The suspension may not, however, be indefinitely prolonged so as to become permanent; for such a punishmet would require a School Committee hearing under Mass. Ge. Laws c. 76 sec. 17. Jones v. City of Fitchburg, 211 Mass. 66 (1912). This procedure, the defendants claim, is required only where the child in question lives within the district of his own school; transfer students, they say, are subject to the special sanction of permanent banishment by the principal and without a hearing.

Thus the student body at the Taft School is divided into two groups subject to disparate disciplinary standards, sanctions, and procedures. Resident pupils are treated as first-class citizens of their school--they may be permanently barred from attending it only under the procedures of Mass. Gen. L. c. 76 and, since those procedures have not been invoked for thirty years in practice enjoy the right to complete their education in their own school. Their disciplinary infractions are dealt with within the framework of the assumption that they will continue to attend their school and that it is the school's responsibility to provide them with corrective guidance as well as scholastic instruction.

Transfer students, on the other hand, are second-class citizens--they run the continual risk of banishment from their own school. Their probabion is endless; though they may attend Taft and the Taft Annex for years, as the plaintiff Lois Owens,has done, they are never allowed to belong to their own school. At any moment the edict may issue by which they are sent away from their schoolmates.

This policy, under which one segment of the student body is made to live under constant threat of expulsion, bears no retional relationship to any reasonable purpose. The importation into the field of student discipline of a classification (residence) properly pertaining to the policy of maintaining neighborhood schools is unjustifiable; where a child lives has nothing to do with whether he is a fit candidate for a particular form of discipline. The purpose of any disciplinary regulation--the maintenance of order at school and the correction of individual behavior problems--is unrelated to the geographical classification according to which the defendants claim the right to apportion disciplinary sanctions. The only reason which has become apparent for treating transfer students differently is the apparent conviction of the defendants that they do not belong in the school, are there on sufferance, and can never achieve equality with its "rightful" citizens.

Such classifications deny the equal protection of the laws in violation of the Fourteenth Amendaent to the Constitution of the United States whether they derive from the explicit language of a statute, see e.g. McLaughlin v. Florida, 379 U.S. 184 (1964), the practical application of a statue, Hernandez v. Texas, 347 U.S. 473. 478 (1954), or the action of an individual under color of official authority even where "the particular action... was not authorized by state law," Griffin v. Maryland, 378 U.S. 130, 135 (1964). The test is uniform: the classification in question must be "of some rationality" and "have some relevance to the purpose for which the classification is made," Rinaldi v. Yeager, 384 U.S. 305, 308-08 (1966),Accord, Robertson v. Ott, 284 F. Supp. 735, 737 (1968). To repeat, the wholly disciplinary purpose of the policy of forced transfers which is at issue in this case bears no rational relationship to the geographical basis on which is is applied.

B. BECAUSE ITS INCIDENCE IS RACIAL, THE DISTINCTION FURTHER VIOLATES THE EQUAL PROTECTION CLAUSE.

When an arbitrary geographical classification runs substantially along racial lines, as is the case at the Taft School, it perpetrates even greater injury and is subject to even closer scritiny, Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In a school where the transfer students are overwhelmingly black and the resident students overwhelmingly white, the application to transfer students of discriminatory standards of discipline effectively segregates the school internally in at least two ways.

First, it invites the intrusion of racial and racist attitudes into the disciplinary process. It encourages those who would treat black students as pariahs or as congenital disciplinary problems. Moreover, in a school in which they are in a distinct though substantial minority, it saddles black students with the burden of avoiding trouble and perhaps inevitable racial friction; in a situation where over ninety per cent of all black students and less that seven tenths of one per cent of white students are subjected to the defendants' policy, the odds are overwhelming that when similar misconduct on the part of both black and white students occurs the blacks will incur the heavier retribution.

Second, the policy stigmatizees black schools, black neighborhoods, and inevitably blacks themselves as inferior and undesirable. It treats the ghetto schools in the students' own districts, from which they may have sought transfer for a variety of reasons, as penal institutions banishment to which is the severest sanction within the principal's power. The circle of racial discrimination is complete: the students, having had impressed upon him at the outset that the "privilege" of attendance at the white school is conditioned on his accepting second-class status there, is constantly reminded by the threat of expulsion (and the periodic actual expulsion of his fellows) that, should he violate the peculiar standards of conduct laid down for his class, he will be sent back to the black school. That school is of course no better equipped than the white school to deal with the child and his problems; it is simply a convenient limbo to which certain children may be banished when the school of their choice no longer chooses to have them.

That the words "black" and "white" may not be used in describing to the students their respective estates is of no importance; the racial incidence of the double disciplinary standard is perfectly plain to them. It is as true of such students as it was of the plaintiffs in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that such a separation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *id*. at 494. In the fifteen years since Brown we have learned much about not only the feelings of inferiority, but also the crippling anger and resentment, that such discrimination can produce.

The figure bears repeating: the policy of the defendants, ostensibly geographical in incidence, applies to more than ninety per cent of the black students at the Taft Junior High School and to only three of its more than 400 white students. Whether it can be said that such segregation is purposefully racial in conception, or whether it is merely the inevitable result of the application in an urban context of a spurious geographical distinction, the Constitution forbids it.

The maintenance of racially discriminatory standards within an institution is of course as repugnant to the Equal Protection Clause as would be the application of such standards to two different schools. *See*, *e.g*. *McLaurin* V. *Oklahoma State Regents*, 339 U.S. 637 (1950), where even before *Brown* V. *Board of Education*, *supra*, it was held that a black student at a predominantly white graduate school could not be forced to sit, work, and eat apart. And the peculiarly compelling considerations which require the striking down of even a colorably rational policy where it in fact results in discrimination in the public schools have been well reviewed in the extensive and well-documented opinion rendered in the recent case of Hobson v. Hansen, 269 F. Supp. 401, 508 (D. D.C. 1967):

> If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in the public schools ireesistibly calls for additional justification. What supports this call is our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country. With these interests at stake, the court must ask whether the virtues stemming from the...policy...are compelling or adequate justification for the considerable evils of *de facto* segregation which adherence to this policy breeds.

Hobson v. Hansen, *supra*, noted that the policy (neighborhood schools) with which it was dealing was "not 'devoid of rationality,'" *ibid.*, quoting Blocker v. Board of Education, 226 F. Supp. 208 (E.D.N.Y. 1964). Nevertheless, because of the considerations discussed in the quoted passage, the Hobson court struck the neighborhood school policy down. The policy at issue in this case discriminates as truly as did that involved in Hobson; by contrast with the neighborhood school policy itself, however, the policy of neighborhood discipline within a single school has no rational basis at all. Viewed as either a geographical or a racial distinction, it cannot be justified; and this Court is respectfully urged to hold that the policy's patently discriminatory denial of the equal protection of the laws to the plaintiffs and their schoolmates violates the Fourteenth Amendment to the Constitution of the United States.

THE PLAINTIFFS ARE ENTITLED TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS EVEN IF OPEN ENROLLMENT IS CHARACTERIZED AS A PRIVILEGE

The notion that a governmental body may somehow avoid the limitations of the Due Process and Equal Protection clauses of the United States Constitution by labeling the benefit it accords a "privilege" is an anachronism. As Judge Fuhy has stated, in now classic language:

> One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law. Homer v. Richmond, 292 F. 2d 719, 722 (D.C. Cir. 1961)

In almost every area involving the distribution of Government "largess" it has been held that Due Process and Equal Protection set the outer limits of legitimate Governmental action:

A. PUBLIC EMPLOYMENT

Numerous Supreme Court cases have held that Government is limited in both the manner and reasons for which it may withhold the benefit of public employment. In Wiemen v. Updegraff, 344 U.S. 183, 1 2 (1952 the court stated:

> We need not pause to consider whether an abstract ight to public employment exists. It is sufficient to say that constitutional p otection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary.

Fifteen years later the court reiterated its earlier pronouncement when it stated in Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967):

> The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable has been uniformly rejected.

See. Pickering v. Board of Education, 88 Sup. Ct. Rptr. 1731, (1968); Whitehall v. Elkins, 88 Sup. Ct. Rptr. 184 (1967); Cramp v. Board of Higher Education, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Johnson v. Branch, 364 F. 2d 177 (4th Cir., 1966); Board of Trustees of Arkansas A & M College v. Davis, 396 F. 2d 730 (8th Cir., 1968); Birnbaum v. Trussel, 371 F. 2d 672 (dd Cir., 1966);' Parker v. Lester, 227 F. 2d 708 (9th Cir., 1955). cf. Greene v. McElroy, 360 U.S. 474 (1959).

B. PUBLIC HOUSING

As in the ase of public employment, it is now clear that a public housing tenant is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In Rudder v. United States, 226 F. 2d 51, 53 (D.C. Cir., 1955), for example the court stated:

> The Government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.

Numerous state courts have reiterated a similar position. in Lawson v. Housing Authority, 270 Wisc. 269, 275, 70 N.W. 2d 605, 608 (1955), the court held:

> If a precedent should be established that any governmental agancy whose regulation is attacked by court action can successfully defend such an action on the ground thet plaintiff is being deprived thereby only of a privilege, and not a vested right, there is extreme danger that the liberties of any minority group in our population, large or small, might be swept away without the power of the courts to afford any protection.

See, Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 321, 122 N.E. 2d 522, 524 (1954); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 886, 279 P. 2d 215, 216 (1955), cert. denied 350 U.S. 969 (1956). cf. Thorpe v. Housing Auth. of Durham, 386 U.S. 670 (1967). Holmes v. New york Housing Authority, 398 F. 2e 262 (2d Cir., 1968).

C. GOVERNMENT LICENSE

In numerous contexts it has been held that a Governmental body may not deny a license inconsistently with the Due Process and Equal Protection Clauses of the United States Constitution. In Gonzales v. Freeman, 334 F. 2d 570 (D.C. Cir., 1964) a corporation was barred from doing business with the Comodity Credit Corp. The court held:

> ... to say there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily either substantively or procedurally..." id. at 574.

> There is of course, no constitutional right to receive public welfare any more than there is a constitutional right to public education or even police protection. However, if the state chooses to provice such public benefits, privileges, and prerogatives, it cannot arbitrarily exclude a segment of the resident population from their enjoyment.

See. Denny v. Health and Social Services Board, 285 F. Supp. 526 (E.D. Wisc. 1968); Harrel v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), probable jurisdiction noted, 390 U.S. 940 (1968); Ramos v. Health and Social Services Board, 276 F. Supp. 474 (E.D. Wisc. 1967), Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), probable jurisdiction noted, 389 U.S. 1032 (1968); Green v. Dept. of Public Welfare, 270 F. SUpp. 173 (D. Del. 1967). See also, Kelly v. Wyman, F. Supp. (68 Civ. 864 S.D.N.Y. November 26, 1968) in which a three judge court held that welfare recipients are entitled to a hearing before their benefits are terminated.

E. PUBLIC SCHOOL STUDENTS

The right-privilege distinction has also been abandoned when the question of disciplining public school students is involved. In Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir., 1961), the court stated:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires thet the act be consonant with due process of law. Id at 155.
>
> ...the state cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. Id at 156.

See, Woods v. Wright, 334 F. 2d 369 (5th Cir. 1961); Knight v. State Board of Education, 200 F. Supp. 174 (N.D. Tenn. 1961); Due v. Florida A. & M University, 233 F. Supp. 396 (N.D. Fla. 1963); Estaban v. Central Missouri State College, 277 F. Supp. 649(W.D. Mo. 1967)

Woody v. Burns, 188 So. 2d 56 (Fla. 1966); Goldberg v. Regents of University of California, 57 Cal. Rptr. 2d 463 (1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967). See also, Brunside v. Byars, 363 F. 2d 744 (5th Cir. 1966).

One reason for the relatively recent discard of the right-privilege distinction is based upon the fact that the distribution of Governmental benefits and services has grown tremendously in the last two decades. Largely because of this growth, courts have realized that fundamental constitutional protections must extend to all relations between a citizen and his government. Moreover, those old cases which discussed a government's obligations in terms of rights and privileges are analytically unsound. Due Process and Equal Protection are such fundamental rights that they cannot be made to depend upon labels. The mandate of the Fourteenth Amendment is that Government must act fairly in its relations with its citizens. Fairness must always depend upon the nature of the public interest and the private interest involved, and the reasonableness of the Governmental action. The most fundamental constitutional rights of Due Process and Equal Protection certainly cannot depend upon semantics. See Van Alstyne, The Demise of the Right-Privelege Distinction in Constitutional Law. 81 Harv. L. Rev. 1439 (1968); Reich, The New Property, 73 Yale L.J. 733 (1964); Note Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

THE PLAINTIFFS HAVE BEEN DENIED THEIR RIGHT TO PUBLIC EDUCATION WITHOUT A HEARING IN VIOLATION OF THEIR RIGHTS TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The importance of the private interest in public education has been emphasized by the Supreme Court in numerous contexts. In Brown v. Board of Education, 347 U.S. 483 (1954), the Court reaffirmed what is now a universally accepted point of view:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultured values,in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. 374 U.S. at 493.

Cf. Griffin v. County School Board of Prince Edward County, Va., 377 U.S. 218 (1964))

Relying upon Brown, the Fifth Circuit identified the private interest in attending a particular state college when it stated:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning at which the plaintiffs were students in good standing....It is an interest of extremely great value. Dixon v. Alabama State Board of Education, 294, F. 2d 150, 157, (19610, cert. denied 368 U.S. 930 (1961).

The Commonwealth of Massachusetts, through several statutory and constitutional provisions, has also affirmed the importance of the right ot public education in this society. Mass. Gen. Laws Chapter 76 § 5 provides:

> Every child shall have the right to attend the public schools fo the town where he actually resides.

Mass. Gen. Laws Chpater 71, Sec. 34 provides:

> Every city and town shall annually provide an amount of money sufficient for the support of the public schools.

Mass. Constitution pt. 2 Chapter 5 Art. 3, Sec. 2 provides that it is the duty of legislators and magistrates to support and promote the public schools.

Having established the right to a public education, the Massachusetts General Court has provided a tort remedy if a school committee wrongfully excludes or refuses to admit a student to a public school. Mass. Gen. Laws Chapter 76, Sec. 16. Evidence that a student has been excluded from the public schools without a hearing establishes a prima facie case of wrongful exclusion. Carr v. Inhabitant of Town of Dighton, 229 Mass. 304, 118 N.E. 525 (1918); Bishop v. Inhabitants of Rolley, 165 Mass. 460, 43 N.E. 191 (1896).

The statutory right to a hearing before a student is permanently excluded from the public schools is established by Mass. Gen. Laws Chapter 76 17 which provides:

> A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him and his parent or guardian an opportunity to be heard.

The constitutional right to a hearing before a student is dismissed from a public school is well established. In the leading case of Dixon v. Alabama State Board of Education, 294 F. 2d. 150 (5th Cir., 1961), cert. denied 368 U.S. 930 (1961), the court invalidated expulsions of college students without any notice or opportunity to appear at a hearing. In doing so, the court applied long-established criteria of fundamental fairness within the general contest of the Fourteenth Amendment to the Constitution of the United States. The Dixon court stated:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depends upon the circumstances and the interests of the parties involved. 294 F. 2d. 150 at 155.

Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

As Professor Seavey wrote, in commenting upon what he described as a shocking example of according a school student far less procedural protection than a pickpocket:

> Although the formalities of a trial in a law court are not necessary, and although the exigencies of school or college life may require the suspension of one reasonably thought to have violated disciplinary rules, it seems fairly clear that a student should not have the burden of proving himself innocent. The fiduciary obligation of a school to its students not only should prevent it from seeking to hide the source of its information, but demands that it afford the student every means of rehabilitation. If it has not done so, this opportunity should be given by the courts. Warren Seavery, Dismissal of Students: "Due Process", 70 Harv. L. R. 1407, 1410.

On the general question of due process requirements whenever deprivation of government-created rights is threatened see Reich, "The New Property", 73 Yale L.J. 733 (1964).

The court in Dixon, supra, elaborated at some length to flesh out its insistence upon due process whenever the right to public education is at stake. The court described the "minimum procedural requirements" as follows:

> They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proved, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the Administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.

It is important to note that Dixon has been followed in suspension cases as well as expulsion cases, Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961). In Knight college students were suspended subject to conditional reinstatement when and if convictions for disorderly conduct were reversed. But even there, where the students had in fact alread been convicted of a crime, the court refused to tolerate action so drastic as suspension before a hearing had been held. The court established that the students "were deprived of a valuable right or interest" by suspension from college. The court added:

> It required no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. Indefinite suspension pending the appeal of the Mississippi convictions...might well be for practical purposes the equivalent of outright expulsion. 200 F. Supp. at 178.

The court concluded that due process required that a hearing be had:

> the rudiments of fair paly and the requirement of due process vested in the plaintiff's right ot be afforded an opportunity to present their side of the case before such drastic disciplinary action was invoked...Ibid.

Thus, it is clear that even in a suspension case, due process would require a hearing. But the due process conclusion is that much more inescapable here because plaintiffs were told by the school officials they would not ever be re-admitted to the Taft Junior High School.

The Dixon rationale has also been applied to high school cases. In Woods v. Wright, 334 F. 2d. (5th Cir., 1964), the Fifth Circuit refused to permit suspension of a high school student even pending hearing where he had been suspended for violation of a city ordinance. The court recognized the irreparable injury each day of suspension entailed.

Relying on Dixon, a federal district court in New York recently stated: "Fundamental fairness dictates that a student cannot be expelled from a public educational institution without notice and hearing...Arbitrary expulsions and suspensions from the public schools are also constitutionally repugnent on due process grounds." Madera v. Board of Education of the City of New York, 267, F. Supp. 356 (S.D.N.Y., 1967).[1]

The principles of Dixon have also been adopted in the recent New York case, Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967). In that case the court held that the decision of the Board of Education to bar a high school student from taking the State's regents examination (including college and scholarship qualifications tests) without a prior hearing was a violation of Due Process.

Other recent cases affirming the principle of Dixon include: Esteban v. Central Missouri State College, 277 F. Supp.

649 (W.D. Mo. 1967); Due v. Florida A & M University, 233 F. Supp. 396 (N.D. Fla. 1963); Woody v. Burns, 188 So. 2d 56 (Fla. 1966); and Goldberg v. Regents of University of California, 57 Cal. Rptr. 2d 463 (1967). See also, Note - "Developments in the Law of Academic Freedom", 81 Harvard L. Rev. 1045, 1134-42 (1968). Note, "Student Rights and Campus Rules, " 54 Cal. L. Rev. 1 (1966); Van Alstyne, Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations, 2 Law in Transition Q.1 (1965); Note, School Expulsions and Due Process, 14 Kan. L. Rev. 108 (1965); Note, School Expulsions and Due Process, 1 Indiana Legal Forum 413 (Spring 1968).

The notion that school officials must accord students a hearing prior to exclusion from a public school is merely the application of general principles of fundamental fairness as developed in analagous areas. In addition to school cases such as Dixon, it has been held that the government may not terminate important benefits before offering a hearing. Willner v. committee on Character and Fitness, 373 U.S. 96 (1963) (right to practice law); Schware v. Board of Bar Examiners, 353, U.S. 232 (1957) (right to practice law); Goldsmith v. Board of Tax Appeals 270 U.S. 117 (1927) (right to practice as an accountant); Gonzales v. Freeman, 334 F. 2d. 570 (D.C. Cir. 1964) (right to enter into government contracts); Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964) (right to a liquor license); Kelly v. Wyman, F. Supp. - (S.D.N.Y. 1968) (right to welfare benefits - opinion is attached in appendix); Birnbaum v. Trussel, 371 F. 2d 672 (2d Cir. 1966) (right to employment at a state hospital); Board of Trustees of Arkansas A & M College v. Davis, 396 F. 2d 730 (7th Cir. 1968 (right to teach at a state college).

The process due the plaintiffs in the instant case was a fair heaing before they were dismissed from the Taft School Their interest in remaining at the Taft and not to be discharged for misconduct, is substantial. First, the interruption of their education during the middle of the school year would have severe educational, psychological, and social effects. Even if another school were made availabe to them, they would have to undergo the tramatic adjustment to new teachers, new curriculum, new friends, etc. Secondly, the psychological and educational impact of a discharge for misconduct is impossible to assess, but there is no question that it would have a substantial effect.

The private interest in a hearing to contest the serious allegations of misconduct significantly counterbalances any legitimate public interest in summary discharge. Indeed, it is difficult to identify any legitimate public interest served by Summary discharge. Moreover, the mandate of Mass. Gen. Laws chapter 71, Sec. 37C, to alleviate racial imbalance in the public schools, should require a predominantly white school to establish fair procedures to carefully ascertain the facts before discharging an out-of-district black student.

in this case it is clear that plaintiffs were not accorded a hearing prior to their dismissal. The plaintiffs were never given notice of specific charges of misconduct, never had an opportunity to present witnesses in their own behalf, never had an opportunity to cross-examine witnesses, and never had an adult represent their interests before the decision to discharge them was finalized on January 23, 1969.

Footnote I - The holding in Madera, supra, that a pupil could not be deprived of the right to counsel at a suspension, hearing was reversed in Madera v. Board of Education, 386 F 2d 778 (2d. Cr. 1967). The appellate decision did not repudiate Dixon, however, Rather it found the proceeding in Madera, supra, to be factually different and distinguished.

RELIANCE ON "CONDUCT" AS THE STANDARD FOR THE PERMANENT EXCLUSION OF A STUDENT FROM A PUBLIC SCHOOL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The defendants assert that the "conduct" of each of the plaintiffs is the ground for withdrawing her "privilege to attend the Taft Junior High School under the open enrollment policy. The defendants further rely solely on "conduct" as the standard for withdrawing permanently the privilege of out-of district attendance which, it is contended, is a matter confided exclusively to the principal's discretion without any right to notice of the charges, a hearing, confrontation of the witnesses, or appeal. "Attitude" is an integral part of the "conduct" standard, according to the defendant Devlin, and bad "attitude" justifies the dismissal of students attending the Taft School under the open enrollment policy.

The plaintiffs maintain that imposition of such a severe disciplinary penalty as permanent exclusion from school solely by reference to so vague a standard as "conduct" violates the principle of fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. More specifically, the plaintiffs contend that the standard of "conduct":

A) is void for vagueness in that it fails to put students on notice of what behavior constitutes sufficient grounds for permanent exclusioin;

B) unconstitutionally vests an adjudicatory official with unfettered discretion;

C) offends due process of the law in that its vagueness effectively deprives a student threatened with permanent exclusion of the opportunity to make a defense;

D) is overboad and impermissibly restrains the exercise of the rights of free speech and association guaranteed by the First Amendment.

A. THE "CONDUCT" STANDARD IS VOID FOR VAGUENESS

It has long been recognized that criminal statutes may be held unconstitutional under the void for vagueness doctrine. See, e.g., Lanzette v. New Jersey, 306 U.S. 451 (1939) (voiding a statue making it a crime to be a "gangster"). In Connally v. General Construction Co., 269 U.S. 385, 391 (1929) the Supreme Court set forth both the reasons underlying the void for vagueness doctrine and the standard by which statutes were to be measured:

> That the terms of a penal statue creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary methods of fair play and the settled rules of law. And a statue which either forbids or requires the doing of an act in terms so vague that men of normal intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

The Connally Court further noted that constitutional infirmity was avoided by statues using words having either "a technical or other specific meaning well enough known to enable those within their reach to correctly apply them" or "a well-settled common law meaning". Ibid.

While the void for vagueness doctrine originates and finds its primary application in the field of criminal law, it has been held applicable in other areas as well. For, as the Supreme Court stated in Small Company v. American Sugar Refining Co., 267 U.S. 233, 239 (1925):

> The ground or principle of the decisions was not suchas to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

See also, Champlin Refining C. v. Corporation Commissioner of Oklahoma, 286 U.S. 210, 243 (1932).

Laws inhibiting the exercise of First Amendment rights have frequently been set aside for vagueness. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), for example, declared unconstitutional a statue requiring public school teachers to sign a loyalty oath as a condition to continued employment. See also, Baggett v. Bullitt, 377 U.S. 360 (1964); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). Significantly, the Cramp Court accepted the appellant's allegations that he had not engaged in the conduct proscribed by the statue and loyalty oath and had no fear of a possible perjury conviction should he sign the oath. The Court apparently considered the possible discharge from employment as sufficiently "penal" to render the statute unconstitutionally vague.

In recent years the vagueness doctrine - and its corollary, the requirement of ascertainable standards- has been applied in areas of the civil law not involving First Amendment rights. It has been held that the denial of an application for a liquor license involves an adjudicative process and that the applicant must, inter alia, be afforded the...."opportunity to know, through reasonable regulations promulgated by the board of objective standards which had to be met to obtain a license." Hornsby v. Allen, 326 F. 2d 605, 610; reh. den. 330 F. 2d 55 (5th Cir. 1964); Barnes v. Merritt, 376 F. 2d 8 (5th Cir. 1967).

Gonzalez v. Freeman, 334 F. 2d 570, 579 (D.C. Cir. 1964) held the Secretary of Agriculture could not bar dealings with the Commodity Credit Corporation absent inter alia, "regulations establishing standards and procedures." (The Court avoided decision of the constitutional question be interpreting the relevent statute in conjunction with the Administrative Procedure Act to require standards, notice of the charges, and a hearing.) See also, American Airlines v. C.A.B., 359 F. 2d 624 (D.C. Cir. 1966); Overseas Media Corp. v. McNamara, 385 F. 2d 308 (D.C. Cir. 1967).

The only case directly in point is Soglin v. Kaufman, decided December 13, 1968 by the U.S. District Court for the Western District of Wisconsin (C.A. No. 67-C-141). (A copy of the opinion is reproduced in the appendix.). The court held "... that a regime in which the term "misconduct" serves as the sole standard violates the due process clause of the Fourteenth Amendment by reason of its vagueness, or, in the alternative, violates the First Amendment as embodied in the Fourteenth by reason of its vagueness and overbreadth." Id at 15-16.

The decision in Soglin was limited to disciplinary action involving expulsion or suspension for any significant period.

Id at 16. In reaching his decision Judge Doyle took judicial notice of the fact that extended suspension or expulsion"... may be well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding." Id at 12.

"Conduct" is no more amenable to precise definition than "misconduct". Certainly it is necessary for the public schools to possess a panoply of disciplinary tools which may be used summarily to maintain order among young children. But is it not necessary - and even educationally destructive - to impose severe sanctions having a permanent impact on a student's future life and education without reference to meaningful established criteria and absent any minimal procedural safeguards.

It is possible to develop student behaviour standards for the purposes of suspension, expulsion, or involuntary transfer which are not phrased "... in terms so vague that men of normal intelligence must necessarily guess at [their] meaning and differ as to [their] application." Connally v. General Construction Co., supra. This principle is recognized in a statement by the American Association of University Professors:

> The disciplinary powers of educational institutions are inherent in their responsibility to protect their educational purpose....In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to counseling, guidance, admonition, and example. In the exceptional circumstances when these preferred means fail to resolve problems of student conduct, proper procedural safeguards should be observed to protect the student from

> the unfair imposition of serious penalties. The following are recommended as proper safeguards in such proceeds. [footnote omitted]
>
> A. Notice of Standards of Conduct Expected of Students. Disciplinary proceedings should be instituted only for violation of standards of conduct defined in advance and published through such means as a student handbook or a generally available body of university regulations. Offenses should be as clearly defined as possible, and such vague phaases as "undesirable conduct" or "conduct injurious to the best interests of the institution" should be avoided. Conceptions of misconduct particular to the institution need clear and explicit definition.

51 A.A.U.P. Bull. 447 (1965), reprinted in Emerson et al, Political & Civil Rights in the United States, 1042, 1045 (3d ed. 1967).

The plaintiffs request that their discharge from the Taft School be set aside since it was based upon a standard which was unconstitutionally vague. Merely providing the plaintiffs with the hearing required by due process of law is, given the standard which would be applied in such a hearing, insufficient relief because "well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law". Baggett v. Bullitt, supra at 370 (1964).

B. THE "CONDUCT" STANDARD VESTS AN ADJUDICATORY OFFICIAL WITH UNFETTERED DISCRETION IN VIOLATION OF THE DUE PROCESS CLAUSE

The Supreme Court early dispelled the notion that merely because the exercise of discretion is often essential to govern, it may be exercised without reference to any objective standards. The Court declared unconstitutional a municipal ordinance regulating laundries, stating "the power given to them [the responsible officials] is not confied to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and ackowledges neither guidance nor restraint." Yick W. v. Hopkins, 118 U.S. 356, 366-367 (1886).

The Court noted that the existence of such power was anathema in a democratic society:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the plan and action of purely arbitrary power ...For, the very idea that one man may be compelled to hold his life, or the means of living, or any other material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. Id at 369-370.

The need for "ascertainable standards", Hornsby v. Allen, supra at 612; cf., Baggett v. Bullitt, supra at 372, to govern decision-making by administrative officials is clear: the operation of "absolute and uncontrolled discretion" is an "intolerable invitation to abuse" Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968) (requiring an objective method for selection of public housing tenants), "a]nd experience teaches that prosecutors too are human", Cramp v. Board of Public Instruction, supra at 287; Baggett v. Bullitt, supra. Accordingly, actions taken by administrative officials without reference to ascertainable standards embodied in rules or regulations have been declared invalid. Holmes, supra; Hornsby v. Allen, supra; Barnes v. Merritt, supra; Gonzalea v. Freeman, supra.

The open enrollment policy is a part of the Boston School

Committee's plan (required by the Racial Imbalance Act, Mass. Gen. Law. c. 71 Sec. 37D) to alleviate racial segregation in the Boston public schools and to provide quality education to ghetto children. The need for such a policy arises from the effects of past racial prejudice. It would ind ed be "blinking reality", Cramp, supra at 286, not to acknowledge the continued existence of racial prejudice in American society and the difficulty of discerning what decisions are racially motivated. Moreover, one cannot ignore the fact that the Racial Imbalance Act has met resistance in Boston. See, School Committee of Boston v. Board of Education, 352 Mass. 693, 227, N.E. 2d 729, appeal dismissed, 389 U.S. 572 (1967).

The defendants assert that a principal has the power to adjudicate the right of students to remain in his school under the open enrollment policy. This power, they assert, may be exercised without reference to ascertainable standards to guide and limit the principal's exercise of his discretion.

The arbitrary or capricious act of a principal in dismissing a student from his school involves the imposition of a severe sanction. It may summarily destroy the aspirations of the plaintif s, their parents, and others like them, as well as defeat the legislative purpose embodied in Mass. Gen. Law c. 71 sec. 37C, 37D.
It is, therefore, imperative that the defendants establish standards to limit the principal's exercise of discretion to legitimate prrposes and to provide a basis for review of such

decisions. See, *Bishop v. Inhabitants of Rowley*, 165 Mass. 460, 43 N.E. 191 (1896).

C. THE LACK OF A STANDARD DEPRIVES THE PLAINTIFFS OF AN OPPORTUNITY TO MAKE A DEFENSE

The plaintiffs are asked to adhere to a standard of "conduct". This term is susceptible of such vagaries of interpretation and application that it is in reality no standard at all. The plaintiffs have, at most, been charged with having "escorted" students from another school into the Taft School or with having a "disruptive attitude". In addition, defendants have expressed an interest in organizations outside the school to which the plaintiffs might belong or support.

The vagueness of the standard, the charges, and their possible ramifications deprive the defendants of the opportunity to rebut the claims of misconduct. See. gen., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161-173 (1951) (concurring opinion). In reality, the defendants have impermissibly shifted to the defendants an impossible burden of proof: the establishment of "good" conduct and "good" attitude. Cf., *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Soglin v. Kaufman*, (D.C. W.D. Wis. 1968) (C.A. No. 67-C-141)

D. THE STANDARD OF "CONDUCT" IS OVERBROAD AND UNCONSTITUTIONALLY CHILLS THEIR FIRST AMENDMENT RIGHTS

Undeniably, the behaviours of students within the public schools is an appropriate subject for regulation by the Boston School Committee. And the power to regulate clearly imples the power to impose penalties for the violation of school disciplinary rules. The regulatory power not unrestricted, however, as the Supreme Court noted in Shelton v. Tucker, 364 U.S. 479, 488,

> ...even though the govennmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Overbreadth is inherent in the vagueness of "conduct" as a disciplinary standard. A standard which, in its application, may include "attitude" clearly "...creates a 'danger zone' within which protected expression may be inhibited." Dombrowski v. Pfister, 380 U.S. 479, 494 (1965). "A rule against 'misconduct' is so grossly vague that possible involvement of First Amendment rights cannot be ignored." Soglin v. Kaufman at p. 7 (D.C. W.D. Wis. 1968) (C.A. No. 67-C-141).

The plaintiffs are gour young black girls who are in a distinct racial minority in a school populated and run by a sometimes hostile white majority. Under the defendants' interpretation of the open enrollment policy, the plaintiffs' status as students is far more tenuous and the possible invasion of their First Amendment rights is much more likely than the teachers whom the Supreme Court thought it necessary to protect in such decisions as Baggett v. Bullitt, supra; Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).

That the disciplinary policy which the defendants have superimposed on the open enrollment policy has a constitutionally impermissible "chilling effect," Dombrowski, supra at 494, on plaintiffs' rights of free expression and association is readily apparent. One need only take notice of the current disputes over community control of the schools, consider the possibility of plaintiffs' advocacy of community control, and examine the difficulty previously encountered by the National Association for the Advancement of Colored People under the guise of legitimate regulation. See, N.A.A.C.P. v. State of Alabama, 357 U.S. 499 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

It is not open to the defendants to object that the "conduct" standard has not in fact been used to impair the plaintiffs' expression or association: "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." N.A.A.C.P. v. Button, supra at 435. The importance of the values protected by the First Amendment opens to judicial scrutiny the possible application of the regulation in other factual contexts, and it is not necessary that the party raising the issue actually participate in the privileged conduct. Id at 432.

CONCLUSION

On the basis of the facts and authorities set forth above, plaintiffs respectfully submit that this Court should grant the relief requested.

By their Attorneys,

MICHAEL L. ALTMAN
JOHN E. BOWMAN, JR.
Boston Legal Assistance Project

FREDERIC D. DASSORI, JR.
Choate, Hall and Stewart
Boston, Mass.

NOTE: The Owens case was settled by stipulation. The Boston School Committee agreed to set up certain procedural safeguards in disciplinary proceedings. The following excerpt from the new Boston Public Schools "Code of Discipline" reflects the substance of the Owens stipulation.

* * *

III. Procedures for transfers and suspensions.

(1) Initial suspension and conference with parent.

(a) Whenever an administrative head decides to suspend or transfer a pupil for disciplinary reasons, he may suspend the pupil for up to three school days if the pupil is under 16 and up to five school days if the pupil is over 16 years of age. In such cases the administrator shall forthwith request the attendance of such suspended pupil and the parent or guardian of such suspended pupil at his office for the pupose of consultation and adjustment. Within the initial period of suspension the administrative head may reinstate the pupil or, after the conference with the parent or guardian, he may refuse to do so. Within said period he may transfer a pupil with the consent of the pupil and his parent or guardian.

(2) Reference of the matter to the assistant superintendent.

(a) If the pupil is neither reinstated within three school days of his original suspension if he is under 16 or within five school days if he is over 16, nor transferred within said period, then the matter shall be referred in writing by the administrative head to the assistant superintedent for the district in which the school is located. The pupil and his parent or guardian shall be notified in writing by the administrative head of their right of appeal and to a hearing before the assistant superintendent and they shall be given his name, address and telephone number.

(3) Hearing.

Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter which shall be conducted as follows:

(a) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the facts and issues involved (including a statement of the alleged misconduct and proposed disciplinary action) to afford them reasonable opportunity to prepare and present evidence and argument.

(b) All parties shall have the right to call and examine witnesses to introduce exhibits, to question witnesses who testify and submit rebuttal evidence.

(c) The assistant superintendent is not required to observe the rules of evidence observed by courts, but evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

(d) A student shall have the right to be represented by his parent or guardian and/or counsel if the student so chooses.

(e) The decision of the assistant superintendent shall be based solely upon the evidence presented at the hearing and shall be in writing.

(f) Any party shall, of his own expense, have the right to record or have transcribed the proceeding before the assistant superintendent.

(4) Decision.

The assistant superintendent shall reach a decision in the matter within six school days of the original suspension if the pupil is under 16, or within ten school days of the original suspension if the pupil is over 16. A copy of the decision shall be delivered or mailed to the administrative head, to the pupil and his parent or guardian with notification of their right to request that the superintendent review the decision. In the event that the decision is not made within the requisite period of time, and the delay is not due to failure to appear or other inaction on the part of the pupil or his parent or guardian, the pupil shall be reinstated pending the decision.

(5) Review by superintendent.

The administrative head or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the asssitant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter.

(6) Review by School Committee.

If such case is not settled by the superintendent within five additional school days, the administrative head or the pupil so suspended or his parent or guardian may request that the School Committee review the matter and the School Committee may hold a hearing if it so elects.

(7) Temporary reinstatement.

In the event of appeal by the administrative head to the superintendent or the School Committee, pending decision in the matter by the superintendent or the School Committee, the pupil shall be temporarily reinstated.

IV. Procedures for exclusions.

Whenever an administrative head recommends exclusion, the matter is to be decided by the School Committee after a hearing to be held in accordance with the procedures for hearings in Section III.

V. Required reports.

An administrative head is required to report to the superintendent, the associate superintendent at the proper level, the area assistant superintendent for the district in which the school is located, and to the police all cases of assault and/or battery on school personnel.

VI. Restitution.

Following suspension for wilful defacement, damage, or destruction of school property, payment for defacement, damage or destruction shall be demanded. Terms or payment will be established at the discretion of the administrative head.

VII. Teacher and pupil appeals.

(1) Any teacher who is not satisfied with the action taken by the administrative head in a disciplinary case may appeal the decision in writing to the assistant superintendent, associate superintendent, superintendent, and School Committee in proper order.

(2) Any pupil or any parent or guardian of any pupil against whom disciplinary action is taken who believes that such action is unlawful or in violation of these rules may so indicate in writing to the administrative head and the assistant superintendent who shall investigate the matter.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

DENNIS ANDINO, a minor child, individually
and on behalf of all others similarly situated,
by his next friend, ANGELINA ANDINO, and

ROBERT BROWN, a minor child, individually and
on behalf of all others similarly situated, by
his next friend, JULIETTE BROWN,

Plaintiffs,

-against-

68 Civil Action No. 5029

BERNARD DONOVAN, as Superintendent of Schools
of the Board of Education of the City of New
York,

RICHARD LUBELL, as Assistant Superintendent
in Charge of Special Education of the Board
of Education of the City of New York,

MARTIN W. FREY, as Assistant District
Superintendent of the Board of Education
of the City of New York, and

NATHAN JACOBSON, as District Superintendent,
District Five, of the Board of Education of
the City of New York,

Defendants.
---X

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Respectfully submitted,

HAROLD J. ROTHWAX
JONATHAN A. WEISS, Of Counsel
Attorneys for Plaintiffs
759 Tenth Avenue
New York, New York 10019
Tel. No. 581-2810

* * *

I. THE RIGHT TO A FREE PUBLIC EDUCATION IS GUARANTEED TO THE PLAINTIFFS BY THE EDUCATION LAW OF THE STATE OF NEW YORK, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FIRST AMENDMENT, TO THE CONSTITUTION OF THE UNITED STATES.

The right of a child to attend the free public schools is a fundamental liberty protected by the statutes of the State of New York and by the Fourteenth Amendment to the Constitution of the United States. While the local Board of Education is authorized to make rules and regulations necessary for the governing of pupils and teachers (Education Law, McKinney's Consol. Laws, §§2503, 2554) this authority may not be exercised in an arbitrary or capricious manner or in violation of the Constitution. West Virginia v. Barnette, 319 U.S. 624 (1943). The federal courts are empowered, both under their inherent equitable jurisdiction and under the Constitution, to rectify injustices wrought by abusive exercise of the regulatory authority of the Board of Education.

The State of New York recognizes the paramount value of education and makes school attendance compulsory on the part of children in New York City between the ages of six and sixteen. Education Law, McKinney's Consol. Laws §3205(i); New York Constit., §1, Art. XI. The law further requires parents to send their children to school and makes it a criminal offense for parents to fail to do so. Education Law, McKinney's Consol. Laws §3212. In addition to this statutory mandate, the Fourteenth Amendment's concept of liberty guards the rights of school children against unreasonable rules and regulations imposed by school authorities. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the state itself and all of its creatures--Boards of Education not excepted." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

"Liberty" under the Constitution has traditionally included the right to education. In one of the early education cases, Meyer v. Nebraska, 262 U.S. 390, 399 (a case affirming parents' rights to see that their children are instructed in modern languages), Mr. Justice McReynolds, speaking for the court, defined this right as follows: ". . . Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis added) If a minor child in this age who lacks substantial means is deprived of the right to a public school education, his opportunities to learn, to make a living, and to engage in the common occupations will be drastically curtailed for the rest of his life. Report of National Advisory Commn. on Civil Disorders (1968), pp. 424-456. The magnitude of this loss to the child prohibits the Board of Education from denying the right to attend school except for the most compelling reasons and in a procedural manner calculated to insure a fair decision with respect to each child.

The Supreme Court of the United States has described the monumental value of the right to a public school education in cogent terms:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both

> demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education." Brown v. Board of Education, 347 U.S. 483, 493 74 S. Ct. 686, 98 L. Ed. 873 (1954). See also Pierce v. Society of Sisters, 268 U.S. 510.

Plaintiffs' right to a public school education is also protected by the First Amendment to the Constitution. The authorities of Brown, Pierce, and the President's Commission on Civil Disorders, supra, are but a sampling of the vast recognition which has been given to the paramount value of an education. In Lamont v. Postmaster General, 381 U.S. 301 (1965), the Supreme Court enunciated more broadly the First Amendment right to exposure to ideas and learning. In that case Section 305(a) of the Postal Service and Federal Employees Salary Act of 1962, requiring the Postmaster General to detain and deliver only on the addressee's request unsealed foreign mailings of "communist political propaganda," was held unconstitutional. The Court premised its decision on a broad "right to learn" protected by the First Amendment, in reasoning which is applicable to the situation in this case: "The dissemination of ideas can accomplish nothing if otherwise willing addressees [students] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (Mr. Justice Brennan, concurring opinion). Mr. Lamont's marketplace in which to receive ideas was the public mails; Dennis Andino and Robert Brown's marketplace is the public schools. The differences in the marketplaces or the ideas received there are irrelevant; the right to receive them is the same.

* * *

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW JERSEY

STEPHEN JOHNSON, individually and as husband and next friend of PAULA JOHNSON, Plaintiffs,	:	Civil Action No. 172-70
vs.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, New Jersey, et al., Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF FACTS

Plaintiffs, Paula and Stephen Johnson, were married on the 8th day of July, 1967. They are now parents of a male child. Paula Johnson was then and is now a student at Paulsboro High School, Paulsboro, New Jersey. Said school is subject to the rules and regulations of the Paulsboro Board of Education. On or about the 27th day of October, 1964, said Board adopted the following rule:

> Policy #5131: Married Students
>
> Any married student or parent shall be refused participation in extra-curricular activities. When a student marries he assumes the responsibilities of an adult and thereby loses the rights and privileges of a school youngster.
>
> This regulation regarding extra-curricular activities shall not be construed to interfere with a married student continuing his education.

Pursuant to said rule, Paula Johnson has been denied permission to participate in the High School athletic program and forthcoming senior class trip to Washington, D. C. On the 10th day of December, 1969, she received a letter from defendant Stouffer regarding said Policy, restating to her its prohibition of her desired participation in said activities. On the 11th day of February, 1970, plaintiffs filed the instant complaint with this court. Defendants' timely answer was received on the 9th day of March, 1970.

QUESTIONS PRESENTED

Whether Policy #5131 and defendants' actions pursuant thereto are invidiously discriminatory and deprive plaintiffs of rights guaranteed by the equal-protection clause of the Fourteenth Amendment.

Whether Policy #5131 and defendants' actions pursuant thereto are unreasonable and deprive plaintiffs of rights guaranteed by thefreedom of speech and assembly clause of the First Amendment.

Whether Policy #5131 and defendants' actions pursuant thereto are unreasonable and deprive plaintiffs of rights guaranteed by the due process clause of the Fourteenth Amendment and the penumbra of civil liberties guaranteed to the people by the Ninth Amendment.

III

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT

The instant policy and practice of the Paulsboro school officials are patently discriminatory. Students who happen to marry or have children prior to graduation compose the subjected class and, as members of said class, they are presently deprived of the right to participate in the entire scope of Paulsboro's extra-classroom program. At present this includes such activities as sports, clubs and overnight trips. The discriminatory nature of this prohibition can hardly be questioned. Two classes of students now attend the Paulsboro school system: those who are married or are parents and those who are single and childless. Both groups may attend class but only the latter may benefit from extra-classroom activities. Plaintiff Paula Johnson is twice damned: being both married and a parent she is clearly subject to the penalties of Policy #5131 and, consequently, defendants have taken action to see that she does not engage in sports and does not go with her friends on the annual Washington trip.

It is clear that the public education opportunities provided by the state "must be made available to all on equal terms." Brown v. Board of Education, supra, 347 U.S. at 493. Classifications which deny educational benefits to some while providing it to others raise serious questions concerning the motivation of the local school officials.

> (W)here fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined. Harper v. Virginia Board of Elections, 383 U.S. 663, 668, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (striking down a Virginia poll tax as invidiously discriminatory).

Although on its face the equal protection clause appears to bar all discrimination in the enforcement and operation of laws and regulations, only "invidious" discrimination is prohibited by the courts. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1965) (statute regulating medical care of vision). The test of "invidiousness" in the area of school law has been articulated above: the discriminatory classification must be reasonably tied to the "maintenance of order and discipline within the educational system." Burnside v. Byars, supra, 363 F.2d at 748. It must be based on some educational purpose or need. It may properly rest on health needs, discipline or order. Thus in Brick v. Board of Education, supra, 305 F.Supp. at 1321, the court sustained a code regulating hair style because of the "substantial evidence that long hair tended to disrupt school activity and distract students and teachers." In Olff v. East Side Union High School, supra, 305 F.Supp. at 559, no evidence being introduced that "plaintiffs' hair style is either a health or safety menance to either himself or other members of the school community," the prohibition was enjoined. See also, Westley v. Rossi, supra, 305 F.Supp. at 713.

The New Jersey legislature has carefully limited the discretion of local boards to circumvent the right to public education. Expulsion and suspension are permitted only in extremely narrow circumstances. Pursuant to N.J.S.A. 18A:40-7 a student may be barred from school for reasons of health. Pursuant to N.J.S.A. 18A:37-2 a student may be barred from school for engaging in particular kinds of conduct which may be best summarized as conduct which would effectively disrupt the education process. With the exception of these grounds, the New Jersey Constitution has mandated that public education be available to all children between the ages of five and eighteen. New Jersey Constitution, Art. 8, §4, para. 1.

1. *Right v. Privilege*:

Although *Brown v. Board of Education*, supra, 347 U.S. at 493 has mandated that educational opportunity be equally provided, it has been argued that extra-classroom activities are not part of the educational process; that is, that they are a privilege, and therefore may be dispensed at the discretion of the school officials without regard to constitutional mandates. The argument has prevailed in ~~five~~ six of the ~~six~~ seven states which have reviewed regulations similar to the instant Policy #5131. *State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court*, 240 Ind. 114, 162 N.E. 2d 250 (1959); *Kissick v. Garland Independent School District*, 330 S.W.2d 708 (Civ. App., Tex.1959); *Cochrane v. Board of Education of Mesick Consolidated School District*, 360 Mich. 390, 103 N.W.2d 569 (1960) (here the court split

4-3 against the regulation); State ex rel. Baker v. Stevenson, 27 Ohio 223, 189 N.E.2d 181 (C.P. Ohio 1962); Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963); ~~and~~ Board of Directors of the Independent School District of Waterloo v. Green, 259 Iowa 1260, 147 N.W. 2d 854 (1967); and Estay v LaFouche Parish School Board. 230 So.2d 443 (La. Ct. of App., 1969)

Six of the cases held that regulations similar to Policy #5131 were valid. The sole exception is Cochrane v. Board of Education, supra, where the court split 4-3 on the validity of the regulation (the majority held it invalid) but an eighth judge thought the issue moot. Thus, the court was divided and technically upheld a lower court ruling which sustained the regulation. It should be noted that in none of the above cases were the constitutional arguments presented herein seriously considered, and all of them were decided prior to the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, supra.

Every case cited recognized that a school board may not arbitrarily prevent a student from attending school; that is, students had a "right" to education which extended, at least, to scholastic activities and, therefore, students who are married or have children could not be deprived of that "right." That is, for the purpose of deciding who should or should not be admitted to the public educational system, it would be arbitrary and invidiously discriminatory to deny admission to students solely on the basis of their marital or parental status. It is certain that no state policy has been recognized which would permit school officials in their discretion to completely bar students who marry or have children from school. However, these courts believed that the "right" to public education did not extend to participation in extra-classroom activities. Thus, enjoyment of extra-classroom activities was a "privilege" dispensed at the discretion of the local school board which could, within reason, discriminatorialy dispense said "privilege." Accepting the right/privilege dichotomy, the courts were then willing to justify barring such students from extra-classroom activities for reasons which they simultaneously refused to accept as justification for completely barring them from all school activities. State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court, supra, 162 N.E.2d at 253-254; Kissick v. Garland Independent School District, supra, 330 S.W. 2d at 711-712; Cochrane v. Board of Education of Mesick Consolidated School District, supra, 103 N.W. 2d at 580, 583; State ex rel. Baker v. Stevenson, supra, 184 N.E. 2d at 188 (ruling limited to inter-scholastic sports); Starkey v. Board of Education of Davis County School District, supra, 381 P.2d at 721; Board of Directors of the Independent School District of Waterloo v. Green, supra, 147 N.W. 2d at 860.

The heavy reliance on the right/privilege dichotomy is well illustrated by the following wording in the Starkey case which was quoted verbatim and heavily relied upon in Green. The court distinguished scholastic from extra-classroom activity and said of the student involved:

> (H)e has no right to compel the Board of Education to exercise its *discretion* to his personal advantage so he can participate in the named activities. *Starkey v. Board of Education of Davis County School District*, supra, 381 P.2d at 721, *Board of Directors of the Independent School District of Waterloo v. Green*, supra, 147 N.W. 2d at 860. (emphasis supplied).

When viewed as a "right," education is mandatory and the local Board of Education has no "discretion" to deny it except for reasons of health or disturbance. When viewed as a "privilege," the Board's discretion is invoked and may be questioned only if exercised arbitrarily, capriciously or unreasonably. This would seem to be the rule of the above-cited cases. It seems that the Constitution, although not stopped at the schoolhouse gate, may only come in part of the way. Extra-classroom activities allegedly are not covered by that document. This distinction completely disregards the fact that like scholastic activities, extra-classroom activities are funded by the state by means of its taxing power as a significant aspect of the educational process. Furthermore, it fails to take into account the fundamental importance of such activities to a well-rounded educational experience. It is no longer the view that education is adequately dispensed in the class-room environment.

Whatever the policy in the states referred to above and whatever the value of the right/privilege dichotomy where constitutional freedoms are involved, the issue is clearly moot in the State of New Jersey. New Jersey's policy with regard to scholastic and extra-classroom activities has been clarified by the Commissioner and the State Board: both are on equal footing, both are equally important and essential to public education, and students have a "right" to both. New Jersey law here is not presented in support of a state ground for relief. It is offered as highly persuasive authority for the view propounded by plaintiffs and seemingly rejected by the Paulsboro Board; that is, that extra-classroom activities are of utmost importance to a well-rounded public education and may not be flippantly curtailed at the whim of the local school board merely at the insistence of some area parents.

2. Policy of the State of New Jersey:

The supreme administrative authority in New Jersey with control over the public education program is the State Board of Education, N.J.S.A. 18A:4-1. The State Board has general supervisory and rule-making powers and is charged with the maintenance of a "unified, continuous and efficient" educational program. N.J.S.A. 18A:4-10, 15, and 16. The Commissioner of Education, working directly under the State Board, supervises all of the public schools in the state. N.J.S.A. 18A:4-23. The decisions of the Commissioner and the State Board establish state policy in educational matters and control the local boards. New Jersey state policy with regard to the importance of extra-classroom activities has been carefully spelled out in detail by the Commissioner and the State Board of Education. In _Willett v. Board of Education of the Township of Colts Neck_, 1966 S.L.D. 202 (Comm'r 1966), aff'd by the New Jersey State Board of Education (slip opinion April 3, 1968), the Commissioner analyzed the importance of "field trips" to the educational process:

> Teaching is more effective and learning is enhanced when it is not confined to actions within the class-room and the school building but moves out into the child's environment and employs actual observation and experience to supplement and enrich class procedures.... (A) field trip is, or should be, a vital learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning... It is the classroom made mobile. _Willett v. Board of Education of the Township of Colts Neck_, supra, 1966 S.L.D. at 205.

In _Smith v. Board of Education of the Borough of Paramus_, (slip opinion of the Comm'r March 28, 1968), aff'd by the N.J. State Board of Education (slip opinion February, 1969) the Commissioner said:

> In pursuit of the goal of the highest degree of self-realization possible for each individual, the schools have traditionally sought an even greater diversity than is provided by formal classroom learnings. Thus, they have provided opportunities for a wide variety

> of extra-classroom activities in which pupils are encouraged to explore and pursue individual interests. Historically these pursuits became known as "extra-curricular," unfortunately connoting something which was tacked on and of minor importance compared with the classroom teaching program. Later, resort was had to use of the term "cocurricular" in an effort to establish the parallel significance of these curricular elements. The semantics are of no moment. ...school affairs such as dances, concerts, dramatic productions, athletic events and the like, although generally referred to as "extra-curricular" were better designated as "extra-classroom," and are certainly part of the total curriculum. Smith v. Board of Education of the Borough of Paramus, supra, at page 6 of the slip opinion. (emphasis supplied).

It is clear that in the eyes of the Commissioner and the State Board, discrimination as to "extra-classroom" activities is as undesirable as discrimination as to scholastic activities. The Paulsboro Board might just as well prevent Paula Johnson from taking English or Mathematics.

The Commissioner went on to underscore the basic policy of the State of New Jersey:

> The existence of a broad and well developed program of student activities is an essential factor in the approval or accreditation of any secondary school. Smith v. Board of Education of Borough of Paramus, supra, at page 7 of the slip opinion.

He referred to Evaluation Criteria (1960 edition of the National Study of Secondary School Evaluation) which establishes the basic criteria for accreditation of New Jersey schools by the Middle Atlantic States Association of Colleges and Secondary Schools and which clearly outlines the policy of educators in the field of secondary education:

> The school provides for two general kinds of educational experience, the regular classroom activity and those called extra-curricular or cocurricular. Together they form an integrated whole aimed toward a common objective. Evaluation Criteria, supra, at 241; as quoted in Smith v. Board of Education of the Borough of Paramus, id (emphasis supplied).

The Commissioner added the following words:

> In the Commissioner's judgment, therefore, boards of education are not only permitted under the law, but have an affirmative duty and responsibility to develop a broad program of pupil activities beyond formal classroom instruction as an essential part of the curriculum offered. Smith v. Board of Education of the Borough of Paramus, supra, at 7-8 of the slip opinion.

It is clearly the manifest policy of the State of New Jersey that the concept of "free public education" connotes both classroom and extra-classroom activities and that pupils, having the right to one, have the right to both. There can be no reasonable basis for distinguishing between the two. Just as marriage per se could not be sufficient grounds to bar Paula Johnson from her English class, so it cannot be grounds to bar her from visiting the Nation's Capitol on a field trip sponsored by her school. The Consitutional mandate of public education for all includes the right to participate in all school activities.

The right/privilege dichotomy cannot be seriously argued. Certainly in providing for non-segregated educational facilities in Brown, the Supreme Court would not have tolerated segregated extra-classroom activities in integrated schools. Monroe v. Board of Commissioners, City of Jackson, Tennessee, 244 F.Supp. 353, 364-365 (W.D.Tenn. 1965), modified, 269 F.Supp. 758 (W.D.Tenn. 1965), aff'd and remanded on other grounds, 380 F.2d 955 (6th Cir. 1967), vacated on other grounds, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed. 2d 733 (1968). Once the schoolhouse gate is open to the Constitution, it must be open all the way.

IV

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFF THE RIGHT TO FREE EXPRESSION AND ASSOCIATION IN VIOLATION OF THE FIRST AMENDMENT

However, the most insidious aspect of Policy #5131 has not yet come to light. For whatever reason it was passed, it clearly and undeniably is an attempt to curtail and severely inhibit Paula Johnson from engaging in free discussion and association with her fellow students while joining with them in extra-classroom activities.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Independent Community School District, supra, 393 U.S. at 506.

The First Amendment deprivation herein is far more serious than that confronted by the Supreme Court in Tinker where the students had been prohibited from wearing black armbands. Here there is a determined effort to deprive Paula Johnson of the most fundamental aspect of First Amendment protection: the right to merely associate with her friends in normal school activities. The idea that she carries with her some sort of infectious moral disease is wholly unfounded in fact and clearly contrary to law. The biases and prejudicies of some parents must not be permitted to work an extreme hardship on the children of our society. The belief that Paula will in some way "infect" or "pollute" her fellow students is a clear manifestation of a warped morality. The clinical and ecological analogies are not exaggerated and should indicate the overkill effect such a regulation has on the students which it condemns. They become isolated from their friends and classmates. In a very real sense they are marked individuals bearing the curse of Cain in and out of class. The school board must not be permitted to gloss over the true significance of Policy #5131. It is clearly an attempt to keep Paula Johnson from even the most casual conversation and association. Once she is permitted to attend school, Paula must not be given second-class status. Such a policy undercuts our fundamental notions of proper school environment.

In Burnside v. Byars, supra, the court said, that:

> (S)chool officials cannot ignore expression of feelings with which they do not wish to contend. They cannot infringe upon their students' right to free and unrestrained expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operations of the school. Burnside v. Byars, supra, 363, F.2d at 749.

If the school wishes to point out to students the difficulties of teen-age marriage or parenthood, it may do so within the traditional confines of the educational process.

> (T)here is still a difference, for example, between conducting a course in "Marriage and Family Living," in which the dangers of teen-age marriage are discussed and even inveighed against, and excluding married students from school or from extra-curricular activities as a means of inducing the other pupils to believe that teen-age marriage is undesirable. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis," 117 U.Pa. L.Rev. 373, 391 (1969).

The imposition of the peculiar moral values of an ever-changing local school board upon the student body of its school system can hardly be tolerated where such imposition results in both a serious deprivation of education experience and a blatant curtailment of speech and association, especially where neither school discipline nor disruption is threatened and no educational purpose is served. If the Paulsboro School Board is truly concerned with student marriage or parenthood it may use the very tools which our educational system purports to foster: discussion, learning and teaching. Where school discipline and disruption are not threatened, no reason, constitutionally entertainable, can be offered for disregarding such fundamental educational tools for the perpetration of purely moral values. See Tinker v. Des Moines Independent Community School District, supra, 393 U.S. at 509-511; West Virginia State Board of Education v. Barnette, supra, 319 U.S. at 632-633 (enforced flag salute invalid but mandatory course in civics clearly would have been permissible.

As early as 1929, the Supreme Court of Mississippi firmly rejected the notion that a child would be barred from school solely because of marriage. McLeod v. State ex rel. Colmer, 154 Miss. 468, 122 So. 737 (1929). The Court's words should have been noted by the Paulsboro Board:

> When the relation (marriage) is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life. McLeod v. State ex rel. Colmer, supra, 122 So. at 738-739.

V

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFFS' FUNDAMENTAL RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE PENUMBRA OF CIVIL LIBERTIES RESERVED TO THE PEOPLE BY THE NINTH AMENDMENT

Defendants have asserted that Policy #5131 is a "moral" matter passed at the request of area parents not to have their children engage in extra-classroom activities with students who marry or have children. But it is impossible to distinguish participation in extra-classroom activities from participation in classroom activities. Defendants admit that the Washington trip and extra-curricular sports are carefully supervised. No rational, let alone reasonable, distinction has been offered to distinguish between curricula and extra-classroom activities. The court might well take note that for a student from a proverty background, a trip to the Nation's Capitol might well be exceedingly more valuable than any number of hours and days spent in a History or civics classroom. Surely their desire to keep Paula out of school altogether would not be honored. On what basis then should their desire to keep her home while her friends go to the Nation's Capitol or their desire to keep her out of extra-classroom sports be honored?

It may be argued that teen-age marriages are disfavored and not to be encouraged and that other students must be shielded from the influence of students who marry or become parents. See State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court, supra, and other cases cited. Plaintiffs contend that if this is not a sufficient ground to bar such students from public school, then it is not a sufficient ground to discriminate against them once they are in school. Regardless, plaintiffs argue herein that said ground is entirely unrelated to any educational purpose and is not sufficient to warrant discrimination in educational opportunity. Furthermore, plaintiffs argue that the right not to be discriminated against because of marital or parental status with regard to educational opportunity is a fundamental right protected by the due process clause of the Fourteenth Amendment and the decision whether to take part in such a program is a right reserved to the plaintiff by the Ninth Amendment.

The so-called "disfavor" with which the state views teen-age marriages is not a legal concept. In New Jersey it has reached judicial cognizance only in terms of a permissive attitude toward granting annulments. In Re Anonymous, 32 N.J. Super. 599, 108 A.2d 882 (Super. Ct., Ch. 1954); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958); B -aka-L v. L, 65 N.J. Super. 368, 168 A.2d 90 (Super. Ct., Ch. 1961).

By statute, New Jersey permits males under 21 and females under 18 to marry with the consent of their parents or guardians. Males under 18 and females under 16 must also obtain the consent of court. N.J.S.A. 37:1-6. Permissive nullity is recognized where such a marriage has taken place and the party who was then underage did not subsequently "ratify" it or "confirm" it upon reaching the age of eighteen. N.J.S.A. 2A:34-1. It should be pointed out that plaintiff Stephen Johnson is now over 21 Paula Johnson is now over 18. No New Jersey law or policy looks with disfavor on their marriage. They have been happily married for over two years. Of utmost importance and significance is the fact that they have done absolutely nothing illegal. Paula Johnson is being clearly discriminated against as a result of her legal actions.

This is not a case where a student has committed a crime, is dangerous to his fellow students, is sick or infirm. Paula simply wishes to engage in normal relations with her friends. She wishes to enjoy the full benefits of the educational experience provided by the Paulsboro public school system. Surely a trip to the Nation's Capitol, a visit to the Congress, White House, Federal Bureau of Investigation, Lincoln and Washington monuments is of significant educational import. Surely the experience of extra-classroom sports activities, of learning to deal in a proper and honest way in competitive enterprises is of significant educational import. It can hardly be argued that plaintiff Paul Johnson is an insidious force in the Paulsboro High School which must be carefully watched and kept from her fellow students.

Yet she is being treated as such. This can only have a deleterious effect on her relations with those students, her education and, most importantly, her marriage itself.

The argument that this is for her own good is also specious. In the first place, it assumes that extra-classroom activities are less important than classroom activities, an opinion not shared by the State Board of Education or the New Jersey Commissioner of Education. Secondly, it assumes that Stephen and Paul Johnson should not be allowed to make this decision for themselves.

This invades the zone of marital privacy protected by the Constitution. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (Conn. 1965).

> We deal with a right of privacy older than the Bill of Rights... . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. Griswold v. Connecticut, supra, 381 U.S. at 486.

Surely the preemption by the Paulsboro School Board of a decision best left to the Johnsons is an invasion of the privacy of their marital relationship. The Policy says that by marrying the student "assumes the responsibility of an adult." Unless the board is being facetious, it would seem the decision to go on the Washington trip or take part in sports activities is one which the Johnsons are clearly responsible to make.

It is difficult to calculate the harm caused to Paula Johnson by reason of the board's regulation. She is partially isolated from her peer group, left to receive a second-rate educational experience and forced to view her own marital relationship as an encumbrance on her educational opportunities and friendships. The Paulsboro Board has perverted the ~~[illegible]~~ sanctity of the marital act by relegating it to an occurrence subject to punishment, resulting in partial isolation and exclusion. This is clearly unconstitutional.

CONCLUSION

For the above stated reasons plaintiffs argue that Policy #5131 and defendants' actions pursuant thereto are in violation of the First, Ninth and Fourteenth Amendments to the Constitution of the United States and, therefore, pray that this court:

1. delcare that said Policy #5131 is void as unconstitutional;

2. enjoin defendants from taking any actions pursuant to said Policy;

3. enjoin defendants from taking any actions which would in any way limit plaintiff Paula Johnson from participating in extra-classroom activities at Paulsboro High School by reason of her marital and/or parental status;

4. grant all other relief as may be necessary and proper to an equitable adjudication of this action; and

5. award plaintiffs the costs of this action.

Respectuflly submitted,

On the Brief:
Carl Stephen Bisgaier,
Esq.

DAVID H. DUGAN, III, DIRECTOR
CAMDEN REGIONAL LEGAL SERVICES, INC.
Attorney for Plaintiffs

By: Fred W. Schmidt, Jr.
Fred W. Schmidt, Jr.
Of Counsel

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

STEPHEN JOHNSON, individually and :
as husband and next friend of
PAULA JOHNSON, :

Plaintiffs, : Civil Action 172-70

vs. :

BOARD OF EDUCATION OF THE :
BOROUGH OF PAULSBORO, etc.,
et al., :

Defendants. :

ORDER
GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This matter having been opened to the Court by plaintiffs' on motion for summary judgment and defendants' having been heard on cross-motion for summary judgment, Carl S. Bisgaier, Esquire, of counsel to David H. Dugan, III, Director, Camden Regional Legal Services, Inc., appearing on behalf of plaintiffs, and Eugene P. Chell, Esquire, of Falciani, Cotton, Chell and Stoinski, appearing on behalf of the defendants, and all facts necessary to the determination of these motions having been stipulated by the parties hereto, the Court having found that there is no genuine issue as to any material fact, that plaintiffs are entitled to a summary judgment as a matter of law and that, as a matter of law, defendants' cross-motion for summary judgment should be denied, IT IS on this the 16th day of April, 1970, ORDERED that:

1. this Court has jurisdiction over this action;

2. that Policy #5131 of the Board of Education of the Borough of Paulsboro, of the State of New Jersey, entitled

april 17

"Married Students", which was revised and adopted by said Board on the 27th day of October, 1964, is hereby declared to be in derogation of the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional, illegal and void;

3. that the defendants, who are charged with the enforcement of the provisions of the aforesaid policy, their representatives, agents, employees and successors are hereby permanently enjoined and restrained from taking any action pursuant to said policy; and

4. that the defendants, who are charged with the enforcement of the provisions of the aforesaid policy, their representatives, agents, employees and successors are hereby permanently enjoined and restrained from discriminating against students as to participation in extra-curricular activities solely on the basis of said students' marital and/or parental status~~, and~~ ...

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLYDIE MARIE PERRY, et al.,

Plaintiffs,

-vs-

THE GRENADA MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Defendants.

CIVIL ACTION

NO. WC 6736

PLAINTIFFS' TRIAL MEMORANDUM IN SUPPORT OF THE COURT'S JURISDICTION AND FOR PERMANENT INJUNCTIVE RELIEF

PAUL BREST
REUBEN V. ANDERSON
538 1/2 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

STATEMENT

On or about September 6, 1967, plaintiff Clydie Marie Perry attempted to register to attend the eleventh grade at a school maintained by defendants. Her admission was refused on the ground that she was the mother of an illegitimate child. An appeal was made on behalf of plaintiff to the superintendent of schools. By letter dated September 13, 1967, the superintendent, on behalf of the Board of Trustees of the school district, informed plaintiff that her exclusion from school was permanent, for the reason she had been given, and was consistent with long-standing policy.

A complaint on behalf of plaintiff was filed in this Court seeking declaratory and injunctive relief on the grounds, inter alia, that the school board's policy of automatic and permanent exclusion of unwed tennage mothers violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Defendants' answer was duly served and filed on September 23, 1967.

On October 9, 1967, a hearing was held in this Court on plaintiff's motion for a preliminary injunction. Prior to the commencement of that hearing on motion, a second unwed teenage mother, Emmas Jean Wilson, was added as a plaintiff in this action.

On December 21, 1967, this Court, per Judge Clayton, sitting by special designation as District Judge, issued an opinion and order denying plaintiffs' motion for preliminary injunction. However, the Court retained jurisdiction of the case in order that it might ultimately be "fully litigated on a more complete record and the rights of the parties determined in a more complete and permanent way."

SUMMARY OF THE EVIDENCE

The Board's Disciplinary Policy

It is the long-standing policy of the defendant board that a girl who has an illegitimate child is automatically and permanently excluded from attending any school in the district. No hearing or interview is conducted prior to the execution of this discipline. The board makes no effort to determine whether the father of the illegitimate child of a teenage girl is a student in one of the schools of the district, and no male student has ever been expelled from school for having fathered an illegitimate child (R-15).

In all other forms of student misconduct, the offending student is given a hearing or an interview with either the superintendent of schools or a principal (R-21,22,23). In cases of all such other misconduct there are discretionary degrees of punishment determined by a school principal or the superintendent on the basis of factors in extenuation and mitigation, as, for example, prior offenses, and overall character and attitude evaluation (R-29,30). In all other forms of misconduct, leniency is applied in cases of a first offense (R-23), and suspension -- even for a period of weeks -- is applied only after multiple infractions (R-22).

Clydie Marie Perry completed the eleventh grade in 1965; since that year she has not attended school (R-65). In September,1967 she took the initiative to have herself readmitted (R-65). She had been a student in good standing up to the time she became pregnant (R-69). She testified that she wanted to return to school because she believed that completing high school was important to her economic future (R-66,67).

Clydie Marie testified that she had never had sexual intercourse prior to the experience which led to her pregnancy; that since that time she had not engaged in intercourse, and did not intend to do so prior to marriage (R-68). She further stated that she regretted her mistake (R-69), and did not intend discussing it with other children (R-70).

Emma Jean Wilson was fourteen years of age when she testified at the hearing in October, 1967, and would have entered the ninth grade (R-72). Her child was born in January, 1967 in Chicago, where Emma Jean had gone from Grenada when she discovered that she was pregnant (R-74). In Chicago she attended a special school for unwed mothers both during her pregnancy and after the birth of her baby, and in so doing she was able to complete the eighth grade (R-74,75). On completing the eighth grade in the Chicago school, Emma Jean returned to Grenada with the baby and enrolled in Carrie Dotson High School in the fall of the 1967-68 school year (R-75). She was in school for three weeks when she was called into the principal's office and asked to withdraw because of her illegitimate child (R-72,73). While in school Emma Jean never flunked a subject (R-77), and she testified that she wanted to complete her education in order to have a good economic future (R-76).

Emma Jean stated that she had had only the one sexual experience by which she became pregnant and that she did not intend to have another prior to marriage (R-76,77).

Witnesses who knew Clydie Marie and Emma Jean were called. One, Mrs. Senora Springfield, a teacher in Grenada for twenty years, and a neighbor of Clydie Marie's, testified that Clydie Marie "is a very nice, quiet girl, and is regarded in the community as a person of generally good character." She further testified that the girl had acted ashamed of having had pre-marital sexual intercourse and an illegitimate child, and never proud or boastful about it (R-43,45). Mrs. Springfield has a young niece whom she considers to be good and decent, and she testified that she would have no hesitation in allowing her niece to associate with Clydie Marie (R-46).

Another teacher, Mrs. Elizabeth Brown Nichols had instructed Emma Jean during the three weeks of her attendance in September, 1967 (R-49). Mrs. Nichols testified that Emma Jean was an excellent student who seemed highly motivated to learn (R-50). Emma Jean, Mrs. Nichols further testified, seemed a little shy and withdrawn, but worked well with other students when group work was required (R-51). Mrs. Nichols stated that she did not know that Emma Jean had had an illegitimate child until she was expelled from school (R-51), and further stated that, based on her experience as a teacher, she did not believe that Emma Jean was the kind of girl who would try to adversely influence other children (R-52).

Mrs. Peggy Joyce Ross testified that she knows and has been a neighbor of both Clydie Marie and Emma Jean since they were very young (R-54,56). She described both girls as "nice" and "very quiet" (R-54,56). She further testified that to the best of her knowledge neither girl was, nor had a reputation as, "loose", promiscuous", or "immoral" (R-55,56).

Some form of suspension or exclusion of pregnant school girls and unwed teenage mothers is not an uncommon tradition in various localities throughout the country. The rules permitting girls to return to school after the birth of their babies are varied. Some school districts have followed the practice of deciding on a case-by-case basis (Howard, pp. 20, 21). Others have employed the same general practice but require that such a returning girl be enrolled in a school other than the one which she previously attended (Rumsey, p. 9).

Increasingly, school boards which have employed rules of exclusion either solely during pregnancy or subsequent to the birth of the baby as well, are coming to re-examine such policy (Howard, pp. 6,7). The change is being spurred by a better appreciation of, as Dr. Sarrel put it, the disastrous consequences which attend illegitimacy (Sarrel, p. 12). These consequences have been recognized as medical, psychological, sociological, as well as educational in scope (Sarrel, p. 12). Educationally, it has been found that long periods of denied access to school "sours the educational motivation of the girls and contributes to their becoming drop-outs" (Sarrel, p. 12). Dr. Sarrel did a study of 100 teenage girls who after a first illegitimate child were barred from school. At the end of five years, 95 had had repeat pregnancies, and 91 of these girls were unmarried, totaling 349 pregnancies (Sarrel, pp. 12,13). Sixty of the girls were on welfare and they accounted for a total of 240 of the 349 children. Plaintiffs' experts agreed that the denial of access to education made such results almost certain (Sarrel, p. 47; Howard, pp. 9,10).

The expert witnesses testified that in communities considering allowing unwed mothers to return to school, there usually were fears that they would have contaminating or disruptive effects on their fellow students (Howard, pp. 8,9; Sarrel, p. 19; Rumsey, p. 10). In some communities efforts were made to learn whether any factual basis supported fears of the danger of contamination, and none was found (Rumsey, p. 12). However, communities which have permitted such girls to return to school have found their fears of contamination and disruption unfounded (Howard, p. 9; Rumsey, pp. 14,15). These reports come from communities and school districts of various sizes and locations throughout the country (Howard, pp. 31,32).

One expert testified that in his opinion the presence of unwed mothers served as an effective deterrent to other girls to engage in premarital sexual intercourse which, in his opinion, has led to a decline in the number of illegitimate pregnancies (Sarrel, pp. 36,37). Though all the experts considered the programs through which girls are returning to school desirable, there is evidence that they are not indispensible to positive results.

Prior to the adoption of the program at Yale, Sarrel, for a period of five years, followed the progress of 56 girls who had had a first illegitimate child and were allowed to return to school (Sarrel, pp. 28,29). He testified that 85% of these girls finished high school, and six of these girls entered college (Sarrel, p. 29).

JURISDICTION

The arguments of plaintiffs, and the opinion of Judge Clayton in support of the jurisdiction of this Court, are a matter of record in this case, and need only be briefly reiterated here.

Plaintiffs, in their complaint, alleged that this Court has jurisdiction of this action based on the provisions of 28 U.S.C. s1343. In its opinion, after hearing on plaintiffs' motion for preliminary injunction, the District Court, per Judge Clayton, sitting by Special Designation as District Judge, quoted the relevant sub-sections of section 1343:

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States ....
>
> (4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights ...."

The cause of action which these plaintiffs have brought was created and authorized by Congress in 42 U.S.C. s1983 to protect individual constitutional rights, as was noted by the District Court in its opinion. Judge Clayton, opinion, p. 10. The rights, privileges or immunities which plaintiffs asserted are, *inter alia*, those contained in the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Defendants do not deny that they were acting under colors of state law, but in their Memorandum Brief, filed on or about October 14, 1967, and on oral argument on January 28, 1969, contend the absence of federal district court jurisdiction on the grounds that, by stipulation, plaintiffs have dropped their claim that the policy here in question was enforced on a racially discriminatory basis, and that without allegations and proof of such racial discrimination, the jurisdiction of this Court must fail. This contention ignores other allegations contained in plaintiffs' complaint and arguments in plaintiffs' memorandum in support of the Court's jurisdiction, filed on _or about_ October 16, 1967, and further ignores conclusions of law contained in the memorandum opinion of Judge Clayton. Plaintiffs originally alleged racial discrimination in the enforcement of the subject policy, and subsequently agreed, by stipulation, to drop said allegation. However, racial discrimination was but one of several alternative grounds alleged by plaintiffs, either of which would be sufficient for the proper exercise of jurisdiction by the federal district court.

In their memorandum in support of jurisdiction, plaintiffs argued, _inter alia_:

> "The complaint avers that defendants' blanket policy (clearly a "regulation, custom, or usage") of denying unwed mothers admission to the schools deprives plaintiffs of rights and privileges secured by the Fourteenth Amendment to the United States Constitution. Inter alia, the policy violates the due process clause of the Fourteenth Amendment because it is not reasonably related to any valid purpose (VIII), and because it is enforced in an arbitrary and capricious manner without reasonable standards or fair procedures (VIII). Inter alia, the policy violates the equal protection clause because it creates an invidious classification, discriminating against unwed mothers because of their status and sex (VII)."

The District Court, per Judge Clayton, concluded:

> "The claims of plaintiffs of unconstitutional deprivation of rights secured by the Fourteenth Amendment _cannot be classed as immaterial, insubstantial or frivolous_. Thus, for present purposes only, this court now holds that it does have jurisdiction of the subject matter of this suit and of the parties. A host of authorities could be cited to support this view, but at this time, no good would result therefrom." (Clayton, opinion, p. 10) (emphasis supplied).

Jurisdiction has been held proper in actions wholly unrelated to allegations of racial discrimination but nevertheless relying on the equal protection and due process clauses. See, e.g., _Baker v. Carr_, 369 U.S. 186 (1962); _Haque v. CIO_, 307 U.S. 497 (1939); _Monroe v. Pape_, 365 U.S. 167 (1961); _Dixon v. Alabama State Board of Education_, 294 F.2d 150 (5th Cir.), _cert. denied_, 368 U.S. 990 (1961); _Glicker v. Michigan Liquor Control Commission_, 160 F.2d 96 (6th Cir. 1947); _McCoy v. Providence Journal Co._, 190 F.2d 760 (1st Cir. 19), cert. denied, 342 U.S. 894 (1951).

I

The Automatic and Permanent Expulsion of Plaintiffs From School Without Any Preliminary Procedures Violated Their Rights Under the Due Process Clause of the Fourteenth Amendment.

It is a constitutional principle of long and consistent tradition that "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 990 (1961), at p. 155; and see, e.g., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

The minimum procedural requirements necessary to satisfy due procesa depend upon the circumstances and the interests of the parties involved. Dixon, supra. In Joint Anti-Fascist Refugee Committee v. McGrath, Mr. Justice Frankfurter, in a concurring opinion, stated:

> "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense. . . .' Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e.g., Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915). . . . Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity are tolerated." pp. 164-165.

The interests of the parties and the circumstances surrounding the expulsion of these plaintiffs provide no basis for an exception to the due process requirement of notice and fair hearing. Dixon v. Alabama State Board of Education, supra; Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). The rare exception in which the courts have permitted an exception to the rule has been those cases involving alleged threats of immediate danger to the public or to national security, See, e.g., Ludecke v. Watkins, 335 U.S. 160 (1948) (narrowly upholding the Attorney General's summary denial of a visa to an alien deemed dangerous to national security); and see United States ex rel Knauff v. Shaughnessy, 338 U.S. 521 (1950). In Dixon v. Alabama State Board of Education, supra, a case in which students of a publicly supported college successfully challenged their summary expulsion, the respective interests of the parties were evaluated by the Court of Appeals for the Fifth Circuit. Finding that the State of Alabama had no interest sufficient to justify summary expulsion, the Court said:

> "In the disciplining of college students there are no considerations on immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the examples set by the Board in failing so to do . . . can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education." Dixon, supra, p. 157.

The opportunity for an education may, in the highly complex and competitive society of America, have come to be recognized as a right; Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961); cf. Lamont v. Postmaster General, 381 U.S. 301 (1965) (right of access to information), rather than a privilege. Whatever its precise nature, its vital importance as a private interest has been securely established for due process purposes.[1/] The Fifth Circuit in Dixon has said:

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." p. 157.

What was said in Dixon with respect to the importance of a college education must apply with even greater force with respect to the continuation and completion of high school education.

[1/] The district court in Dixon had upheld summary expulsion, inter alia, on the grounds that plaintiffs had no constitutional right to attend a public college. 186 F.Supp., at p. 950. However, the due process requirement of notice and fair hearing need not be predicated on the alleged violation of a prior constitutional right. Cafeteria and Restaurant Workers Union v. McElroy, et al., 81 S.Ct. 1743 (1961).

II.

The Defendant's Rule of Automatically and Permanently Expelling Teenage Unwed Mothers Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment Because It is Inflexible, Unreasonable, Arbitrary and Capricious and has No Reasonable Relation to any Valid Purpose.

The Fourteenth Amendment requires that a state regulation "shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U.S. 502, 525 (1934); cf. Gulf C. & S.F.R. v. Ellis, 165 U.S. 150, 155 (1898); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

The reasonableness of a regulation is to be determined upon the basis of a careful examination of all the relevant facts in a particular case. Nebbia v. New York, supra. In this case the interest of the State of Mississippi in regulating the morals of its citizens collides with the vital interest of the individual in obtaining education. The crucial importance of education has been recognized by the Fifth Circuit in an historic decision. Dixon v. Alabama State Board of Education, supra. Education is all the more important to unwed teenage mothers and their children because of the almost certain disastrous economic, social and cultural consequences which attend illegitimacy. The importance of the individual interests at stake requires that the closest scrutiny be given to an infringing state regulation.

At the outset, it is an undisputed fact that plaintiffs have been excluded from school solely because they have given birth to illegitimate children. It is thus irrebutably presumed that any girl who gives birth to one illegitimate child is irredeemably corrupt and that the presence in school of any such girl creates such a threat of corruption of other students that permanent "quarantine" is viewed as the only solution. The inferential chain underlying the rule is not based on even general supportive evidences and is, in fact, at war with a good deal of evidence and law to the contrary.

The presumption that out-of-wedlock pregnancy is per se proof of bad character and immorality has been specifically rejected. Nutt v. Board of Education of Goodland, 278 Pac. 1065 (1929). Similarly, the assumption that unwed teenage mothers pose such a disruptive threat that their exclusion from school may reasonably be continued after they have given birth to their children has also been rejected. Ohio ex rel Adle v. Chamberlain, 175 N.E.2d 539 (C.P. 1961), Alvin Independent School District v. Cooper, 404 S.W.2d 76 (1966).

The arbitrariness and capriciousness of the rule is demonstrated by the fact that its punitive sanction applies to only one of the offending parties, i.e. the teenage mother. The defendants have admitted that no male student has ever been expelled under the rule, and that no attempt has ever been made to ascertain the identity of even one putative teenage father of an illegitimate child. Thus male members of the student body are left at large with certain knowledge of impunity. In terms of the defendants' attempt to "quarantine" (R-37,38) offending girls by keeping them away from their contemporaries, or vice versa, the efficacy of the rule is extremely questionable, since plaintiffs have ample opportunity to associate with their contemporaries after school hours during the week and during weekends. Moreover, defendants have produced no evidence to support the thesis that "quarantine" if necessary in some cases need be permanent in all cases. The Supreme Court has said that where the interest placed in jeopardy by the State regulation is especially vital, the courts will forbid "broad prophylactic rules" and require "precision of regulation". NAACP v. Button, 371 U.S. 415, 438 (1963). The breadth of the "abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

> "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Shelton v. Tucker, supra; Aptheker v. Secretary of State, supra.

Plaintiffs have presented evidence which contradicts the basic assumptions on which the rule is founded. This uncontradicted evidence shows that all teenage unwed mothers cannot be judged by one inflexible standard, and that careful consideration of such factors as a girl's general reputation, academic record, and current attitude and motivation for education provide a basis for objective determinations on a case-by-case basis. Plaintiffs' evidence further shows that the impact of returning teenage unwed mothers to school depends upon the individual girl; and that generally the return of such girls has not been followed by disruption and increased illegitimacy. In fact, experience has shown that some of these girls have served as constructive examples because of their high motivation for education (Sarrel, pp. 36-37).

On the other hand, the superintendent conceded that not all girls who might become mothers of illegitimate children if allowed to return to school would exert a disruptive or corruptive influence on their fellow students (R-33). He also conceded that, as he is called upon to do in other cases of student infraction of school rules (R-29), he could, if allowed, make a judgment in each case, on the basis of character and attitude, as to whether an unwed teenage mother should be allowed to return to school (R-40).

The fatally defective rigidity of the rule is further illustrated by comparing the punitive sanction which its infraction entails with those which obtain in other forms of student misconduct. In fact, no other form of student misconduct on or off campus gives rise to automatic and permanent expulsion. In all other instances an offending student is interviewed before disciplinary action is taken. Usually the student receives a warning, and even temporary suspension is rarely resorted to.

Defendants have offered no rational explanation for singling out illegitimacy as a form of misconduct so grave as to require the singularly harsh punishment which it entails. Moreover, in light of the countervailing importance of education to both the citizen and the state, no rational explanation is possible.

In Thomas v. Housing Authority of City of Little Rock, 282 F.Supp. 575 (1967), a similar rule of a public housing authority was successfully challenged. There, mothers of illegitimate children were automatically barred from publicly sponsored low-income housing. In invalidating the rule on due process and equal protection grounds, the Court stated:

> "The prohibition of the present policy is absolute. It makes no distinction between the unwed mother with one illegitimate child and the unwed mother with ten such children; it does not take into account the circumstances of the illegitimate birth or births, the age, knowledge, training or experience of the mother, or the possibility or likelihood of future illegitimate births. . . .
>
> . . .
>
> "In the Court's eyes the present regulation is drastic beyond any reasonable necessity in the context in which it was promulgated."

CONCLUSION

Plaintiffs respectfully urge that the Court has juisdiction over this cause, and that such be found and declared. Plaintiffs further urge that on the basis of the uncontested evidence in this case they were permanently barred from school because of a rule which is unconstitutional in two major respects: it provides for automatic expulsion, thus depriving plaintiffs of notice and a fair and impartial hearing; further, it is in its substantive operation overbroad, inflexible, capricious and unreasonable.

Plaintiffs have presented uncontradicted expert evidence which casts grave doubts on the validity of the blanket assumptions underlying the rule -- that out-of-wedlock pregnancy is conclusive evidence of immoral character and in all instances justifies permanent quarantine. Plaintiffs have presented uncontested evidence of their generally good character, despite the mistake of illegitimacy each has made. Plaintiffs finally urge the Court that on the basis of the record in this case they are entitled to an order enjoining defendants from obstructing their immediate readmission to school and holding unconstitutional defendants' blanket rule of automatic, permanent expulsion.

Respectfully submitted,

PAUL BREST
REUBEN V. ANDERSON
538 1/2 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

C O P Y

Special Circular No. 10, 1968-1969

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE SUPERINTENDENT OF SCHOOLS

September 27, 1969

TO SUPERINTENDENTS AND SECONDARY PRINCIPALS

Ladies and Gentlemen:

EDUCATION OF PREGNANT STUDENTS

In recent years the number of pregnant girls of school age has been increasing steadily. These students present a unique educational problem for which we have been attempting to make provision.

We have set up a number of centers for continuing their full-time education and are developing others. Each such center operates under the leadership of a coordinator of licensed supervisory rank and has the same status and recognition as any other school in our system. It is multi-disciplined including a regular secondary school curriculum with provision for special health and counseling needs. Moreover, in association with community and health agencies, a spectrum of other necessary services is provided. Such services include medical care as well as welfare, social work, nursing and special counseling as needed.

Interim evaluation of this program of special centers has supported our original projection that they can provide more effective education than is available through home or part-time instruction which are also available. However, they must be regarded as one resource among a number because of the lack of space and because they may not be the answer to every problem. Our responsibility for the education of all school age children includes the pregnant teen-ager.

These girls should be permitted to remain in their regular school program as long as their physical and emotional condition permits. An individual decision is necessary to determine what is in the best interest of each student found to be pregnant. The girl's parents and physician should be consulted in developing the educational plan to fit her needs. If she is a short time away from completing the term's work or from graduation, and, if her physician advises that she may attend classes, she should be encouraged to continue at her home school. Should this consultation lead to the conclusion that continued attendance at the home school may be detrimental to her physical or mental well-being, she should be transferred to one of the special centers or other suitable arrangements should be made for continuing her education. As in other school matters, the final decision will rest upon the good judgment of the principal of the home school who will consider all the factors involved.

After delivery, the young mother is expected to attend school. If she is returning to an educational center, she should be transferred to a normal school situation as soon as possible. The receiving school must grant credit for all of the work completed at the special educational center as certified by the records forwarded by that school's coordinator. Some of these girls will have completed the course requirements for high school graduation. The guidance counselor of the special educational center will contact the appropriate guidance counselor of the high school she formerly attended, and send her completed record for evaluation. If the requirements for graduation are met, the high school of origin will issue the appropriate diploma.

It is not possible to predict all the problems that may develop in the education of these children. We can expect that the principals and guidance counselors of high schools will cooperate sympathetically with the coordinators and guidance personnel of the special centers in resolving situations that may arise in order to encourage and expedite the continued education of these children.

Please accept my appreciation for your help in supporting this effort to fulfill our obligation to provide maximum education for these young people.

Sincerely yours,

SEELIG LESTER
Deputy Superintendent

UNITED STATES DISTRICT COURT:
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

69 Civ. 4006

CARLOS OVERTON,

Petitioner,

vs.

RAYMOND C. RIEGER, DIRECTOR
OF THE DEPARTMENT OF PROBATION
OF THE COUNTY OF WESTCHESTER,

Respondent.

- - - - - - - - - - - - - - - - - - - X

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

STATEMENT OF FACTS

On December 21, 1964, police officers came to Mount Vernon High School with a search warrant purporting to authorize them to search, among other places, Petitioner's school locker. The police showed the warrant to Dr. Adolph Panitz, the Vice-Principal, and asked him to accompany them and Petitioner to the latter's locker, where the Vice-Principal opened the locker at police request. The locker contained a coat, identified by Petitioner, in response to a police question, as his own. One of the policemen removed the coat from the locker, searched its pockets, and discovered four marijuana cigarettes.

A Motion to Suppress Evidence was made in the Court of Special Sessions and denied, despite the vacating of the search warrant. Petitioner then pled guilty to an information charging him as a youthful offender, in order to test the lower court's ruling on his motion to suppress. He was sentenced to indeterminate probation for up to five years at the discretion of the court.

The Appellate Term, Second Department, reversed and dismissed the charge, but was itself reversed by a divided New York Court of Appeals. After remand to the Appellate Term for consideration of other matters not decided prior to appeal, Petitioner's conviction was affirmed. Petitioner's writ of certiorari to the U. S. Supreme Court followed. That Court vacated the judgment of the Appellate Term and remanded for further consideration in light of Bumper v. North Carolina, 391 U.S. 543 (1968). A divided New York Court of Appeals reaffirmed its initial decision on remand. Petitioner continues to serve his sentence on probation.

ARGUMENT

PETITIONER'S CONVICTION VIOLATED THE FOURTH AMENDMENT, AS INCORPORATED INTO THE FOURTEENTH, IN THAT IT WAS BASED ON EVIDENCE ILLEGALLY OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, PURSUANT TO A DEFECTIVE SEARCH WARRANT.

Before the New York Court of Appeals the State conceded that "the search warrant was properly vacated ...[and] also acknowledge[d] that a search of the locker by the police alone would be invalid without a warrant." *Brief for Appellant in the Court of Appeals*, p.4. Yet the Court of Appeals adhered to its ruling that the search was valid based on the Vice-Principal's third party consent. This holding that one may be presumed independently to consent to a search after being presented with a warrant by police officers seriously undermined the Fourth Amendment requirement that warrants be *valid* and is in plain conflict with the Supreme Court's decision to remand for further consideration in light of *Bumper v. North Carolina*, 391 U.S. 543 (1968).

It is undisputed that the police officers relied on the search warrant. Officer Pappas testified that Petitioner "was searched with the search warrant which gave us permission to search that locker" (R.123)[*]. The Vice-Principal shared their opinion and agreed that he was "honoring the search warrant" when he led Petitioner and the police to the lockers and opened Petitioner's locker, as well as when he first took the police to Petitioner (R.58, 75, 78). At the time of the search, then, all parties believed it was compelled and authorized by the warrant.

---

[*] "R" refers to the record in the state proceedings.

The State's contention that the Vice-Principal acted in spite of the warrant must be viewed in light of the Supreme Court's rulings regarding knowing and informed waiver. Where constitutional rights are involved, the Court has stressed that waiver must "truly be the product of ... free choice," a choice which is made "knowingly and competently." Miranda v. Arizona, 384 U.S. 436, 458, 465 (1966). More precisely, "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Amos v. United States, 255 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10 (1948); Gatlin v. United States, 326 F.2d 666 (D.C. Cir., 1963); Waldron v. United States, 219 F.2d 37 (D.C. Cir., 1955). Where it is "petitioner's constitutional right which was at stake ... and not the [Vice-Principal's]", the Court has viewed consent with special strictness. Stoner v. California, 376 U.S. 483, 489 (1964).

In Bumper v. North Carolina, supra, the Supreme Court settled the precise question at issue here. Defendant's grandmother admitted police to her home after they informed her that they had a search warrant. There was testimony that she willingly let the police in, but the Court announced the rule that when " 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant [w e] hold that there can be no consent under such circumstances." 391 U.S. at 548. The Court's rationale for the rule is distinctly applicable here:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coercion. Where there is coercion there cannot be consent." 391 U.S. at 548-549.

The Bumper rationale should be applied to this case, as the Supreme Court recognized when it vacated and remanded the case for further consideration in light of Bumper. The

New York Court of Appeals, on remand, however, reaffirmed its original decision on the theory that its initial determination was "proper when rendered and is unaltered by the spirit, if not the language of Bumper v. North Carolina, supra." People v. Overton, 24 N.Y.2d 522, ____, 249 N.E.2d 366, 367, 301 N.Y.S.2d 479, 481 (1969), Appendix, infra, p.3. The court rejected the Supreme Court's position on the theory that the Vice-Principal had a "right" to search Petitioner's locker. According to the Court of Appeals, this "right" became a "duty" when suspicion arose. This hypothesis was offered to eliminate the element of actual coercion on which the Court of Appeals believed the opinion in Bumper rested.

But the distinction drawn between Bumper and Overton is clearly without merit. The fact that the Vice-Principal might conceivably have opened the locker on his own on suspicion had there been no warrant for a police search does not affect the coercive impact exerted on the Vice-Principal by the search warrant actually presented to him. Justice Bergan pointed out in dissent that:

> "Mrs. Leath gave her consent to the search of her own house in Bumper, as the Supreme Court of North Carolina found (State v. Bumper, 270 N.C. 521) but this was not permitted to cover in the coercive effect of a bad search warrant which played a part in the resulting 'consent'.
>
> "Even if, on our own independent evaluation of Bumper, we might think it quite distin-

> guishable from the present problem, there can be no doubt that the Supreme Court saw an analogy between the cases ... We are bound to respect this remand." Appendix, infra, p.5.

Furthermore, even if the school has an obligation to enforce its own regulations, based on groundless suspicion, it has an equally important duty to protect its students from unreasonable searches. To assume that consent would have been granted in this case is to ignore the fact that the school can refuse to allow a search where, for example, police demand to search without a warrant. If the retrospective consent approved by the court below is allowable because there is a duty to consent even to an unreasonable search, then school officials are to be denied any discretion in protecting the rights and privacy of students under their supervision.

Moreover, a finding of valid consent in this case would weaken the force of the warrant as a dependable instrument which can be relied upon to relieve a citizen of personal responsibility for a search. A search warrant is intended to be obeyed, and the Vice-Principal quite properly aided the police in their search. But what should he have done had he understood that his aid and acquiescence would later be interpreted as a free and independent consent to search? He might well not have cooperated, fearing possible censure or even a civil action for infringing the student's privacy. Under such circumstances, his lack of cooperation would have been prudent. For the warrant might be vacated and the search ruled improper, though he independently consented to it. A school principal responsible for the protection of his students cannot be deemed privileged to accede to every request a policeman makes. The function of the warrant is to make precise the legal boundaries of a search. To permit the Vice-Principal's cooperation to replace informed consent, therefore, undercuts the power and function of the search warrant and unjustifiably extends the force and meaning of consent. Bumper should be reaffirmed here to protect both the viability of the warrant as a reliable authorization to search and the rights of an individual against consent given after presentation of a warrant - a "situation instinct with coercion." Bumper v. North Carolina, supra, at 549.

PETITIONER'S CONVICTION WAS INCONSISTENT WITH THE FOURTH AMENDMENT IN THAT THE SCHOOL VICE-PRINCIPAL LACKED LAWFUL AUTHORITY AS A THIRD PARTY TO CONSENT TO AN UNWARRANTED SEARCH BY POLICE OFFICERS IN QUEST OF EVIDENCE TO SUPPORT CRIMINAL CHARGES, WHERE SAID SEARCH WAS NOT DIRECTED AGAINST THE PERSON NOR EFFECTS OF THE VICE-PRINCIPAL, BUT TO THE LOCKER ASSIGNED TO PETITIONER FOR HIS EXCLUSIVE USE, AND TO PETITIONER'S COAT, WHICH WAS NOT REMOTELY WITHIN THE PURPORTED AUTHORITY OF THE VICE-PRINCIPAL.

Closely related to the issue of the Vice-Principal's contested consent to the search is the substantial question whether a public high school official could consent in any event to unwarranted police searches of student lockers and apparel. It is the student's privacy and liberty which are endangered, not that of the school official, and in this case the search did not arise out of any ordinary school inspections or searches directly related to school activities.

That the locker was a private place is clear from the record. Each student paid a fee for the exclusive use of his locker during the school year, and the lockers could be locked, as Petitioner's was (R. 77). A direct police search of the locker without a valid consent or warrant would have been illegal, as Respondent conceded in its brief in the court below.

In any event, "the Fourth Amendment protects people, not places. ...[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *** Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Katz v. United States, 389 U.S. 347, 351 (1967). Katz, of course, involved the wiretapping of a telephone booth without judicial authorization. Certainly, Petitioner's expectation of a reasonable degree of privacy in his locker and personal jacket is even more justifiable than that of a man in a glass booth. For other recent decisions which emphasize the "basic purpose of [the Fourth Amendment]... to safeguard the privacy and security of individuals ..." Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (administrative housing inspection), see Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Berger v. New York, 388 U.S. 41, 53 (1967); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304-05 (1967).

The federal courts, state courts, and the Supreme Court have been sensitive guardians of the citizen's privacy under the Fourth Amendment not only in direct search cases, but also when a third party purported to have authority to consent to the search and seizure of another person's belongings. Even where, in administrative cases, authority to search was claimed by a state official who was not with the police, courts have not allowed the official invasion of privacy which the Fourth Amendment was designed to prevent.

One particular line of Supreme Court decisions most closely relevant concerns efforts by hotel keepers to consent to the search of a guest's room. Stoner v. California, 376 U.S. 473 (1964), for example, held that a night clerk had no authority to permit a police search of a room, even though there was " 'implied or express permission' to [certain persons]... to enter his room 'in performance of their duties.' " Id. at 489. While the clerk had a right to enter, this right was for certain purposes related to his duties only and was not freely transferable to the police at the "unfettered discretion" of the night clerk. Id. at 490. Similarly, while a school Vice-Principal might claim some degree of authority to inspect lockers periodically for health reasons, or in case of school emergency, this should not imply that he may probe about at will. Yet that is the meaning of the holding by the New York Court of Appeals.

Stoner is but one of a number of cases which refuse to permit the drastic invasions of privacy implicit in allowing consent by a disinterested third party. Justice Stewart recognized this danger in his opinion for the Court in Stoner when he wrote:

> "[It] was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by work or deed, either directly or through an agent. ***
>
> "No less than a tenant of a house, or the occupant of a room in a boarding house, McDonald v. United States, [335 U.S. 451], a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." 376 U.S. at 489, 490.

See also Louden v. Utah, 379 U.S. 1 (1964) (per curiam) (hotel keeper may not consent to search a guest's room); Chapman v. United States, 365 U.S. 610 (1960) (Landlord may not consent to search of tenant's premises); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949). Only in a particularly rare instance, as when two individuals shared a single duffel bag, has the Supreme Court allowed a third party consent, and that decision was based solely on "plain view" and "mere evidence" cases. See Frazier v. Cupp, 394 U.S. 731 (1969). Certainly the Vice-Principal in the instant case was in no realistic sense a joint occupant with joint use and interest in the locker. His authority to retain a master key was like that of the innkeeper, jail guard, or landlord. It was based upon uneven bargaining power and the strength of authority, not joint interest and use, and hardly congenial agreement.

Decisions by the federal courts of appeal and district courts point in the same direction. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955), held that a married couple had no authority to consent to a search of their own garage for evidence against the husband's mother-in-law who temporarily resided there. Clearly a homeowner has a greater interest in clearing stolen property from his own garage than a Vice-Principal has in exploring through the lockers of those students who have to leave books and jackets in a locker during the day. Yet this interest is not of constitutional dimension. It cannot override the crucial protection afforded all citizens from invasions of their privacy. The Fourth Amendment interposes "a magistrate between the citizen and the police ... so that an objective mind might weigh the need to invade that privacy in order to enforce the law." Chimel v. California, 395 U.S. 752, ___ (1969). A high school Vice-Principal is no more a judicial officer or magistrate than is a son-in-law. He is more like the District

Attorney who issued the subpoena struck down in Mancusi v. DeForte, 392 U.S. 364, 371 (1968).

Similarly, in United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), consent by a government supervisor to search an employee's desk, over which the supervisor clearly had some authority but which was assigned exclusively to the employee, was held not binding on the employee:

> "We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable. No doubt a search of it without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use. But ... the search that was made ... was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed. 188 F.2d at 1021."

Again, Blok was a case in which the third party had a greater interest, for an employee often stands in the shoes of his employer, doing delegated work for the employer using the latter's equipment. Yet this interest was held insufficient to stretch beyond the "civil" incidents of employment. It could not justify a short-circuit of the essential warrant requirement.

The central principles behind the constitutional limitations on third party consent were succinctly put in another recent locker case, United States v. Small, 297 F. Supp. 582 (D. Mass. 1969). There Judge Murray invalidated the warrantless search of a subway station locker, although locker company officials cooperated with law enforcement authorities by changing the lock to enable identification of its user. In granting the motion to suppress, Judge Murray pointed out that "the contents of the locker were not 'knowingly expose[d] to the public.' Katz v. United States, 389 U.S. 347, 351 (1967), [and that] [t]he locker itself may be viewed as 'an area where, like a home *** and unlike a field *** a person has a constitutionally protected reasonable expectation of privacy ***.' 389 U.S. at 360." 297 F. Supp. at 584. He stated:

> "It has been repeatedly held that a person who confers a right to inspect or enter an area, without conferring an equal or similar right to the use or enjoyment of that area, does not authorize the other to consent in his behalf to a search by law enforcement authorities." 297 F. Supp. at 586. [Citing Stoner and Chapman.]

See also Niro v. United States, 388 F.2d 535 (1st Cir. 1968) (landlord's caretaker may not authorize search of tenant's part of building); Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915 (4th Cir. 1965) (mother, who lived with defendant in relative's home, may not consent to search of defendant's room); Klee v. United States, 53 F.2d 58 (9th Cir. 1931) (tenant at sufference may object to search with consent of landlord); State v. Matias, 451 P.2d 257 (Hawaii 1969) (overnight guest may object to search authorized by tenant); People v. Overall, 151 N.W.2d 225 (Mich. App. 1967) (relative-lessee may not consent to search of parolee's room); Tompkins v. Superior Court, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal Rptr. 889 (1963) (joint occupant may not consent).

There are further barriers as well to a ruling that the Vice-Principal could consent to a police search, for the Fourth Amendment is by no means limited to the criminal law setting. Nor is it at all clear that the Vice-Principal could have justified his search as incident to enforcing "civil" or "administrative" disciplinary regulations.

Standards for administrative searches by municipal building inspectors have recently been raised virtually as high as standards for criminal searches. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); James v. Goldberg, 69 Civ. 2448 (S.D.N.Y. Aug. 18, 1969) (administrative warrant required for welfare searches); New York State Liquor Authority v. Finn's Liquor Shop, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969), petition for cert. filed, 38 U.S.L.W. 3055 (U.S. July 23, 1969) (No. 372) (exclusionary rule applicable to administrative disciplinary hearings against liquor licensees). It would be anomalous to permit in this case a lowering of standards for a criminal search because a right to conduct an administrative search may exist. Indeed, this Court made plain in Abel v. United States, 362 U.S. 217, 226 (1960) that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." A housing inspector may not by virtue of his power to enter a building admit a policeman searching for evidence of crime. The search at issue here was not a mere search for school purposes but a search by the police for evidence of crime for which a warrant had been issued.

Granting arguendo that school officials have supervisory power which may extend to inspection of lockers for certain purposes, what is at stake here is the distinction between inspection of the locker by school officials for school purposes and a criminal search by police. Even if school officials may look for violations of school rules or unsanitary conditions, it may not transfer that right to police searching for evidence of crime. See

Knowles, Crime Investigation in the Schools: Its Constitutional Dimensions, 4J. Fam. Law 151 (1964). Compare Moore v. Student Affairs Committee, 284 F.Supp 725 (M. D. Ala., 1968) (searches by school officials permissible if "reasonable" when noncriminal proceeding will result); cf. Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968) (standard for due process in school hearing depends on seriousness of consequences resulting from hearing).

The power of the Vice-Principal to consent to the search is even more clearly lacking here because the search was not confined to an inspection of the locker but included a search of Petitioner's coat. Even under its authority to control school premises, school authorities cannot be permitted at will to allow the search of the person or personal effects of its students. Courts have distinguished between the power to consent to the search of a room and the power to consent to the search of the personal effects within the room. Reeves v. Warden, supra; People v. Egan, 250 Cal. App. 2d 351, 58 Cal Rptr. 290 (Dist. Ct. App. 1966); State v. Evans, 45 Hawaii 622 (1962); cf. Maxwell v. Stephens, 348 F. 2d 325 (8th Cir. 1965) (dissenting opinion). If Petitioner had been wearing his coat it would clearly have been protected from a search without a warrant in these circumstances. Though he had to take his winter coat off inside the school, Petitioner kept it as private as he could by putting it in his locker. This Court should not accept the lower court's rule that a student in school cannot keep his private belongings private, especially when, as here, no overriding school purpose has been shown as to the coat. Particularly where criminal charges may result, the school should not be held to have the same power over the personal effects of its students as it does over school premises.

The decision reaffirmed by the New York court rested largely on the broad supervisory power of the school. But the teaching of In re Gault, 387 U.S. 1, 13 (1967), that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," indicates the limits of this power. If the guarantee against unreasonable searches and seizures "marks the right of privacy as one of the unique values of our civilization," McDonald v. United States, 335 U.S. 451, 453 (1948) it is unthinkable that minors while attending school could forfeit these rights and thereby suffer criminal penalties. One does not waive his rights to due process by going to school. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967); Knight v. State Board of Education, 200 F. Supp. 174 (M. D. Tenn. 1961). While Petitioner was subject to supervision by the school, he retained his rights against outside authorities which the school could not waive for him or force him to waive.

If the school is to perform its educational function properly, it must be given authority over what goes on in the classroom. But where a school official attempts to delegate his authority to the police, the school's broad discretion in teaching matters should not obscure the fact that what are at stake are individual rights against a search for evidence of crime. Indeed, it was in sustaining a trespass action against a teacher who had searched a school pupil that a Judge in an earlier time remarked:

> "A child in the public schools of the state is entitled to as much protection as a bootlegger."

Phillips v. Johns, 12 Tenn. App. 354 (Ct. App. 1930). Finally, the extensive scholarly commentary on search and seizure in the context of secondary or higher education has been of one voice in arguing at length that the student as citizen should have Fourth Amendment protections under a reasonable interpretation of existing law. For the major pieces which expand upon this point, see Van Alstyne, The Student as University Resident, 45 Denver L.J. 582, 588-89 & n.14 (1968); Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 353-56 (1964); Note, Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure, 17 Kan. L. Rev. 512 (1969); Note, College Searches and Seizures: Privacy and Due Process Problems on Campus, 3 Georgia L. Rev. 426 (1969); Comment, 9 Santa Clara Lawyer 143 (1968).

PETITIONER'S CONVICTION AS REAFFIRMED BY THE NEW YORK COURT OF APPEALS ON REMAND, WAS CLEARLY INCONSISTENT WITH BUMPER v. NORTH CAROLINA, 391 U.S. 543 (1968), WHICH SETTLED THE POINT AT ISSUE ON FACTS CLOSELY ANALOGOUS TO THOSE INVOLVED IN THE PRESENT CONTROVERSY

It is well established that rulings of the United States Supreme Court on the meaning of the Federal Constitution bind state courts in subsequent cases, most particularly in subsequent litigation of the same case. Sims v. State of Georgia, 385 U.S. 538, conformed to 153 S.E.2d

567, 223 Ga 126 (1967). The Supreme Court ruled on the precise question at issue here in Bumper v. North Carolina, supra, and so recognized when it vacated the judgment of the New York Supreme Court, Appellate Term, and remanded the case for further consideration in light of Bumper. The decision of the New York Court of Appeals that its initial ruling was in accord with Bumper can not be allowed to stand.

Bumper is quite explicitly founded on the legal coercion present in any situation when an apparently valid search warrant has been presented, and not on the presence or absence either of physical coercion, or of the independent authority to grant consent. The Supreme Court, in keeping with its normal deference to the states, remanded the case to the New York Court of Appeals so that it might render the final judgment in the case rather than be summarily overruled by the highest court. But in light of the reasoning in Bumper, the plain meaning of the order remanding this case for reconsideration in light of Bumper was that Petitioner's conviction should be vacated. As Judge Bergan pointed out, the New York Court of Appeals is bound to respect the remand, and its reconsideration "should be something more than a reiterated statement of [its] previous ground of decision and a categorical rejection of the binding relevancy of Bumper." Appendix, *infra,* p.5.

PETITIONER COULD NOT BE COMPELLED, AS A CONDITION OF ENTERING PUBLIC HIGH SCHOOL, TO WAIVE HIS RIGHT TO OBJECT TO GENERAL SEARCHES OF HIS LOCKER, BECAUSE SUCH COMPULSION WOULD CONSTITUTE AN IMPERMISSIBLE BURDEN ON HIS PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AMENDMENT.

Since Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court has recognized the intimate relationships between the Fourth and Fifth Amendments. It was there held that evidence illegally seized could not be admitted in civil forfeiture proceedings consistent with the Fourth and Fifth Amendments. The Court examined this relationship as follows:

> "[T]he 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment." 116 U.S. at 633.

As the Court later pointed out in reaffirming Boyd, there "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself." Spevack v. Klein, 385 U.S. 511, 515 (1967).

In the present case Petitioner Overton had the unseemly option of not attending high school or attending subject to general searches of the locker reserved for his personal and exclusive use. He had no choice but to accept under duress the authority of school officials to probe his locker at will. That was their non-negotiable demand.

Comparing Spevack, it was as if lawyers who used rented lockers in the public courthouse where they practiced were forced to permit court marshals to search their lockers upon any shadow of suspicion. A student can hardly carry his coat, books, athletic equipment, and all other items from class-to-class, over the period of eleven or twelve years. Accordingly he must make use of the locker assigned to him. If he objected strenuously to casual invasions of his privacy, he would probably be subjected to school discipline. He therefore will endure this regime in the hope that his privacy remains relatively undisturbed. Petitioner Overton's privacy became the victim, however, of the Vice-Principal's master key.

To uphold Petitioner's conviction, a Court would have to rule that the right to attend public high school can be generally conditioned upon waiving the privilege against compulsory self-incrimination with regard to searches of a student's person, effects (jacket in this case), and locker. When the student has to allow a search of his locker for incriminating evidence, he is forced to incriminate himself in a very direct way. The power to retain a key differs only in form from the power to force the student to open the locker himself, remove the contents, empty the pockets, open all containers, and explain what the items are. This compulsion is even greater than that in Spevack and its progeny. Beyond doubt, it is "the imposition of [a] sanction which makes assertion of the Fifth Amendment privilege 'costly.' " Spevack, supra, at 515.

To paraphrase Spevack, "[students] are not excepted from the words ..." of the Fifth Amendment. "[Students] also enjoy first-call citizenship." Id. at 516. Indeed, In re Gault, 387 U.S. 1 (1967), expressly rejected the in loco parentis notions from which the Vice-Principal forced his authority and master key upon Petitioner Overton. Noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," 387 U.S. at 13, the Gault Court squarely applied the full force of the Fifth Amendment privilege to "civil" juvenile proceedings. Id. at 42-57. It should apply here to curtail the asserted authority of the Vice-Principal to force a school student to waive police access to his locker when a school official seeks to open it in search of incriminating evidence. For further authority in the Spevack line, see also Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); McCarthy v. Arndstein, 266 U.S. 34 (1924) (per Brandeis, J.).

PETITIONER'S STATUS OF BEING ON PROBATION FOR A PERIOD OF FIVE YEARS CONSTITUTES BEING "IN CUSTODY" WITHIN THE MEANING OF THE FEDERAL HABEAS STATUTE

Petitioner is presently in the custody of Raymond C. Rieger, Director of the Department of Probation, Westchester, New York. His probation, which may be revoked at the discretion of the State court, has a potential duration of five years, and leaves open the possibility of confinement by the State if revoked. Under the rules of probation his liberty is restricted to a far greater degree than that of an ordinary citizen. The case is accordingly appropriate for disposition by the Great Writ. See Jones v. Cunningham, 371 U.S. 236, 238-44 (1963) (parolee "in custody"); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (excluded alien "in custody" although not in country); Walker v. North Carolina, 372 F.2d 129 (4th Cir. 1967) (per curiam), aff'g 262 F. Supp. 102 (W.D.N.C. 1966) (suspended sentence "in custody"); Foster v. Gilbert, 264 F. Supp. 209 (S.D. Fla. 1967) (custody of defendant's personal attorney nonetheless "in custody"); Rex v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763) (indentured 18 year old girl entitled to writ where assigned by master to another man "for bad purposes"); Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722) (writ available to woman being kept by guardians away from her husband). Compare Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968).

For the reasons outlined in the Verified Petition and supporting Memorandum of Law, Petitioner respectfully urges this Court to issue the writ.

RESPECTFULLY SUBMITTED:

DAVID C. GILBERG
MICHAEL H. GILBERG
22 WEST FIRST STREET
MOUNT VERNON, N. Y. 10550

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 FIFTH AVENUE
NEW YORK, N. Y. 10010

ROY LUCAS
JAMES MADISON CONSTITITIONAL
LAW INSTITUTE
26 WEST 9TH STREET
NEW YORK, N. Y. 10011

ATTORNEYS FOR PETITIONER

WHAT CONSTITUTES YOUR RIGHT TO PRIVACY ON CAMPUS?

Roy Lucas [*]

I. INTRODUCTION

A. The Problems of Student Privacy

   1. Dormitories and Other Dwellings
   2. Lockers, Desks, and Enclosures
   3. Student Records
   4. Reputation and Right to be Let Alone

B. Resolving the Problems to Enhance Privacy

   1. Negotiation, Petition, Confrontation
   2. Adoption of New Codes Protecting Privacy
   3. Use of Affirmative and Defensive Lawsuits to Assert the Various Rights of Privacy

II. THE LAW AND THEORY OF STUDENT PRIVACY

A. Search of the Student, His Dwelling, or his Person and Effects for the Purpose of Seizing Evidence to Justify Disciplinary Action

---

[*] Director - General Counsel, James Madison Constitutional Law Institute, 26 W. 9th St., New York, N.Y. 10011, (212) 475-0590. Editor-in-Chief, COLLEGE LAW BULLETIN, published by U.S.N.S.A., 2115 "S" St., N.W., Washington, D.C. 20008.

1. Rights of the Citizen in Criminal and Administrative Situations to Demand a Search Warrant From the Inspecting Officer, Issued by an Impartial Magistrate or Judge, Based on Proof of Probable Cause to Believe that an Offense has been Committed, and Limited to a Search for Specific Items

(a) Criminal Cases:

"Privacy" A Major Value Protected in All of its Many Forms by the Fourth Amendment -

Katz v. United States, 389 U.S. 347, 351, 359 (1967) (phone booth may not be tapped without prior specific authorization by a judge):

> "[T]he Fourth Amendment protects people, not places. ... [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. ***
>
> "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

Accord, Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Berger v. New York, 388 U.S. 41, 53 (1967); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304-05 (1967).

"Privacy" Not Dependent Upon Owning Premises -

Jones v. United States, 362 U.S. 257, 266 (1960) (weekend house guest may challenge search by police officers conducted without a warrant):

> "Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

Neutral Judicial Officer, Such as Magistrate, Must Issue Search Warrant, Not Police, District Attorney, or Inspector -

Chimel v. California, 395 U.S. ___, ___, 89 S. Ct. 2034, 2039 (June 23, 1969)(lawful search of person on burglary charge cannot render full search of house valid without specific warrant):

> "'Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. ... It was done so that an objective mind might weigh the need to invade the privacy in order to enforce the law. ... [T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.'"

Mancusi v. DeForte, 392 U.S. 364, 371 (1968):

> "[T]he subpoena ... was issued by the District Attorney himself, and thus omitted the indispensable condition [of] 'a neutral and detached magistrate.'"

Accord, Davis v. Mississippi, 394 U.S. 721, 728 (1969); Spinelli v. United States, 393 U.S. 410, 415 (1969); Katz v. United States, 389 U.S. 347, 357 (1967).

(b) Administrative Inspection Cases:

"Privacy" A Major Value -

Camara v. Municipal Court , 387 U.S. 523, 528 (1967) (administrative housing inspection):

> "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is t(safeguard the privacy and security of individuals against arbitrary invasions by government officials."

Accord, See v. City of Seattle, 387 U.S. 541, 543 (1967); James v. Goldberg, 69 Civ. 2448 (S.D.N.Y. Aug. 18, 1969) (warrant required for welfare searcher).

Neutral Judicial Officer Also Required in Administrative Search Situations -

See v. City of Seattle, 387 U.S. 541, 546 (1967) (inspection of business premises):

> "[T]he basic component of a reasonable search under the Fourth Amendment - that it not be enforced without a suitable warrant procedure - is applicable in this context, as in others, to business as well as to residential premises."

Accord, Camara v. Municipal Court, 387 U.S. 523, 529 (1967).

Other noncriminal cases applying the standards of the Fourth Amendment include: One 1958 Plymouth v. Pennsylvania, 380 U.S. 693 (1965)(civil forfeiture case); Boyd v. United States, 116 U.S. 616 (1886); Saylor v. United States, 374 F.2d 894 (Ct. Cl. 1967)(civilian Air Force employee entitled to damages where dismissal based on illegally procured evidence); Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965); Parrish v. Civil Service Commission, 66 Cal. 2d 253, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

(c) Third Party Consent to the Search and Seizure of A Citizen's Person, Dwelling, and Effects:

Stoner v. California, 376 U.S. 473, 489, 490 (1964) (hotel clerk may not consent to search of guest's room):

> "[It] was the [guest's] constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the [guest] could waive ...."

Other court decisions on the question of third party consent include: *Bumper v. North Carolina*, 391 U.S. 543 (1968)(consent ineffective where induced by invalid search warrant); *Louden v. Utah*, 379 U.S. 1 (1964)(per curiam)(hotel keeper may not consent to search of room); *Chapman v. United States*, 365 U.S. 610 (1960)(landlord may not consent to search of search of tenant's premises); *United States v. Jeffers*, 342 U.S. 48 (1951)(hotel proprietor); *Lustig v. United States*, 338 U.S. 74 (1949)(same); *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *Reeves v. Warden, Maryland Penitentiary*, 346 F.2d 915 (4th Cir. 1965); *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951); *Klee v. United States*, 53 F.2d 58 (9th Cir. 1931); *United States v. Small*, 297 F. Supp. 582 (D. Mass. 1969); *Purvis v. Wiseman*, 298 F. Supp. 761 (D. Ore. 1969); *State v. Matias*, ___ Hawaii ___, 451 P.2d 257 (1969); *People v. Overall*, ___ Mich. App. ___, 151 N.W.2d 225 (1967); *Tompkins v. Superior Court*, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).

Cases which permit some form of third party consent still persist, however, and include: *Wright v. United States*, 389 F.2d 996 (8th Cir. 1968)(roommate); *United States v. Stone*, 401 F.2d 32 (7th Cir. 1968) (stepmother); *Burge v. United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965); *United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964); *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967).

For useful legal commentary and analysis of this crucial question, see Note, Third Party Consent to Search and Seizure, 33 U. Chi. L. Rev. 797 (1966); B.J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 49-52 (1969 ed.).

2. Right of the Student in Criminal and Administrative Situations to Demand a Search Warrant From the Inspecting Officer, Issued by an Impartial Magistrate or Judge, Based on Proof of Probable Cause to Believe that a Crime or Disciplinary Infraction has been Committed, and Limited to a Search for Specific Items

According to a 1963 surview, 47% of the public colleges and universities in the United States allow institutional officials to search a dormitory room without the student's consent and in the absence of a justifying emergency. Van Alstyne, Procedural Due Process and State University Students, 10 U.C.L.A.L. Rev. 368, 369 (1963).

The Joint Statement on Rights and Freedoms of Students condemns this practice:

> "Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained."

> "For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed."

Of similar import are: Van Alstyne, The Student as University Resident, 45 Denver L.J. 582, 588-89 & n.14 (1968); Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 353-56 (1964); Student Conduct and Disciplinary Proceedings in a University Setting 18-20 (unofficial study published by N.Y.U. Law School, Aug. 1968); Comment, The Dormitory Student's Fourth Amendment Right to Privacy: Fact or Fiction?, 9 Santa Clara Law. 143 (1968); Note, College Searches and Seizures: Privacy and Due Process Problems on Campus, 3 Geo. L. Rev. 426 (1969); Comment, Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure, 17 Kan. L. Rev. 512 (1969).

Court Decisions are Few and Have Yet to Grasp and Grapple With the Difficult Fourth Amendment Questions Involved -

Phillips v. Johns, 12 Tenn. App. 354 (Mid. Sec. Ct. App. 1930):

5

> "A child in the public schools of the state
> is entitled to as much protection as
> a bootlegger."

Moore v. Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968)(college rule permitting search with no warrant held valid where suspicion reasonable);

Overton v. New York, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), vacated and remanded for reconsideration in light of Bumper v. North Carolina [391 U.S. 543 (1968)], 393 U.S. 85 (1968), re-affirmed on rehearing, 24 N.Y.2d 522, ___ N.E.2d ___, ___ N.Y.S.2d ___ (1969), petition for federal habeas corpus filed No. _____ (S.D.N.Y. Aug. __, 1969)(in preparation)(public high school principal held entitled to retain combination and search student locker at any time);

Donaldson v. Mercer, ___ Cal. App. 2d ___, ___ Cal. Rptr. ___ (Dist. Ct. App. 1969)(same);

People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961)(master of dormitory may consent to police search of student's room at any time - case involved emergency);

State v. Bradbury, ___ N.H. ___, ___ A.2d ___ (1968) (search warrant for coed's room does not cover search of man found there).

B. The Student's Right to Privacy in His Records, Associations, and Reputation

Joint Statement:

Separation of academic and disciplinary records.
Disciplinary records not available to unauthorized persons, except under legal compulsion or in emergency.
No records on political activities and beliefs.
Personal information confidential.

Court Decisions:

Strank v. Mercy Hospital of Johnston, 383 Pa. 54, 117 A.2d 697 (1955)(expelled nursing student entitled as of right to transcript for transfer purposes);

Vigil v. Rice, 74 N.M. 693, 397 P.2d 719 (1964) (libel action against school physician successful where he reported that 13 year old student pregnant, but made no correction when proved false - malice);

Everest v. McKenny, 195 Mich. 649, 162 N.W. 277 (1917) (President of Normal School not liable for slander - told student's landlord that she had loose morals - no malice found, but good faith);

Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1920) (President's letter to student's parents privileged);

see also Morris v. Rousos, 397 S.W.2d 504 (Tex. Civ. App. 1965).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT TRACY HOWARD, III, an Infant,
by his parent
ALENA HOWARD, and
KELLY SAMUEL RICKS, III, and Infant,
by his parent
MARY RICKS,

Petitioners,

-against-

GEORGE CLARK,
as Superintendent of Schools of the
City of New Rochelle, and
JAMES K. BISHOP, DAVID STREGER,
RAMOND D. CALGI, LILA N. CAROL,
FRANK H. CONNELLY, JAMES N. DANDRY,
STANLEY H. GODSEY, GEORGE S. HILLS
and MRS. HOWARD B. KANE,
as Members of the Board of Education of
the City of New Rochelle,

Respondents.

PETITION
FOR JUDGMENT
UNDER CPLR
ARTICLE 78

Index No.

Petitioners, complaining of the respondents, by The Legal Aid Society of Westchester County, Antone G. Singsen, III, and Bernard Clyne, of counsel, their attorney, allege:

1. Petitioner Robert Tracy Howard, III, an infant seventeen years of age, resides with his mother, Alena Howard, at 60 Horton Avenue, New Rochelle, New York.

2. Petitioner Howard was, until March 11, 1969, a full-time student at New Rochelle High School in his eleventh-grade year.

3. Petitioner Kelly Samuel Ricks, III, an infant seventeen years of age, resides with his mother, Mary Ricks, at 81 Winthrop Avenue, New Rochelle, New York.

4. Petitioner Ricks was, until Wednesday, March 12, 1969, a full-time student at New Rochelle High School in his eleventh-grade year.

5. On information and belief, respondent George Clark is the Superintendent of Schools of the City of New Rochelle and is charged with the duty, among others, of imposing and continuing suspension of students from New Rochelle High School pursuant to the Education Law of the State of New York and the Rules and Regulations of the Board of Education of the City of New Rochelle.

6. On information and belief, respondents James K. Bishop, David Streger, Ramond D. Calgi, Lila N. Carol, Frank H. Connelly, James N. Dandry, Stanley H. Godsey, George S. Hills and Mrs. Howard B. Kane are members of the Board of Education of the City of New Rochelle and are charged with the duty, among others, of making lawful rules and regulations for the administration of the schools of the City of New Rochelle, including, among said rules and regulations, those pertaining to suspension of students from New Rochelle High School.

7. That this action is brought on behalf of the above-named petitioner Robert Tracy Howard, III, an infant, by Alena Howard, his mother.

8. That this action is brought on behalf of the above-named petitioner Kelly Samuel Ricks, III, an infant, by Mary Ricks, his mother.

9. On the afternoon of Monday, March 10, 1969, the petitioners were arrested in Mamaroneck, New York, by police officers of that jurisdiction, for criminal possession of a dangerous drug in the fourth

degree and criminal possession of a hypodermic instrument.

10. Neither of the petitioners has ever before been either arrested, tried or convicted of any criminal offense.

11. On Tuesday, March 11, 1969, a story relating the arrest of the petitioners appeared in the New Rochelle Standard Star.

12. On information and belief based upon the relation of petitioner Howard, he was directed on the afternoon of Tuesday, March 11, 1969, by Assistant Principal Daily not to report to school on the following day because he had been suspended. Since that day, petitioner Howard has not been in school and has not been receiving any education.

13. On information and belief based upon the relation of petitioner Ricks, he came to school on the morning of Wednesday, March 12, 1969, discovered his name on the school's "suspension list," left school and has not returned. Since Tuesday, March 11, 1969, petitioner Ricks has not been receiving any education.

14. The petitioners have repeatedly stated that they wish to return to school at once and that they feel that every day that they are out of school is a severe, immediate and irreparable injury both to their present state of education and to their ability to be successful in future education and in life.

15. On Monday, March 17, 1969, a letter to Alena Howard from Principal Adolf Panitz, stating that petitioner Howard was suspended from school and that Mrs. Howard should come to see Principal Panitz to discuss her son's future, was received in the Howard's mail. (A copy of the letter is attached as Exhibit 2.)

16. On Friday, March 14, 1969, a letter from Principal Adolf Panitz, stating that petitioner Ricks was suspended from school and that Mrs. Ricks should come to see Principal Panitz to discuss her son's future, was received by mail by Mary Ricks. (A copy of the letter is attached as Exhibit 3.)

17. On Friday, March 14, 1969, with the assistance of Mr. Napolean Holmes, Director of the New Rochelle Community Organization Program, a meeting was arranged for the morning of Monday, March 17, 1969.

18. On Monday, March 17, 1969, a meeting was held in the office of Superintendent Clark. Present were Superintendent Clark, the petitioners, their mothers, Mr. Holmes, Rev. Andrew Whitted, President of the New Rochelle Branch of the National Association for the Advancement of Colored People, and Mrs. Bertha White, Chairman of the Education Committee of the New Rochelle National Association for the Advancement of Colored People.

19. At the above-mentioned meeting, Superintendent Clark informed the petitioners and their parents that the petitioners had been suspended solely because of the existence of criminal charges against them.

20. Superintendent Clark further informed petitioners and their parents that the suspension was based solely upon Resolution No. 69-323, adopted by the Board of Education of the City of New Rochelle on January 7, 1969, which provides, in part: "...the Superintendent shall suspend any student upon his indictment or arraignment in any court, or upon the institution of proceedings in the Family

Court, for any criminal act of a nature injurious to other students or school personnel..." (A copy of the resolution and attendant discussion before the Board of Education is attached as Exhibit 1.)

21. No trial or hearing has as yet been held on the pending criminal charges against the petitioners, and no evidence has been introduced either in the Mamaroneck court or before the Superintendent to substantiate the charges.

22. The acts alleged as a basis for the criminal charges took place off school property, in another town and not during school hours.

23. No evidence has been offered at any time in any place to show the relation to school conduct that the acts alleged as a basis for the criminal charges are purported to have.

24. On information and belief based upon his own statements, the Superintendent is acting solely on the basis of Resolution No 69-323, which makes no attempt to require any relationship between alleged criminal acts and school matters, and which does not require any investigation into the facts on which the criminal charge is based.

25. At no time has the Superintendent alleged that the petitioners have been insubordinate or disorderly, or that their physical or mental condition endangers the health, safety or morals of the petitioners or of other minors.

26. The suspension imposed by Superintendent Clark, pursuant to the resolution adopted by the Board of Education of the City of New Rochelle, is unlawful and invalid for the following reasons:

a. The suspensions and the resolution upon which they are based violate the Fourteenth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of New York, in that they deprive petitioners of the equal protection of the laws to which they are entitled by arbitrarily, capriciously and invidiously discriminating against all persons, including petitioners, charged with criminal acts without any proof that any acts were committed that in any way relate to education;

b. The suspensions and the resolution upon which they are based violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2 and 6 of the Constitution of the State of New York in that they condemn, penalize and punish all those who are charged with criminal acts, including petitioners, before they have been given a fair trial according to due process of law, allowed to confront witnesses against them and found guilty;

c. The suspensions and the resolution upon which they are based, for the reasons above stated, are against the public policy of the United States and the State of New York as that policy is embodied in the presumption of innocence in criminal cases which is properly protected in both jurisdictions; and

d. The suspensions and the resolution upon which they are based are beyond the powers conferred upon a Superintendent of Schools or upon a Board of Education by the Education Law of the State of New York.

27. No previous application for the relief sought herein has been made.

WHEREFORE, petitioners demand judgment declaring Resolution No. 69-323 of the Board of Education of the City of New Rochelle null void and of no effect and ordering the respondent Superintendent of Schools to permit petitioners to attend New Rochelle High School fort with as full time students in their eleventh year, and granting petitioners such other and further relief as to the Court may seem just and proper.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---x

ROBERT TRACY HOWARD III et ano,

Petitioners

INDEX NO.

-against

2740/69

GEORGE CLARK et al

Respondents

---x

DOUGLAS HERMAN, an infant
by his Parents, LESTER HERMAN and
ELIZABETH HERMAN,

Intervenors

-against-

GEORGE CLARK et al

Respondents

---x

GRADY, J.

This is an article 78 proceeding to compel respondents to reinstate the infant petitioners as full time students in the New Rochelle High School. The infant petitioners were suspended indefinitely pursuant to the New Rochelle School Board Resolution No. 69-323 on March 17, 1969, on the grounds that they had been arrested on March 10, 1969, by the Mamaroneck police and charged with the criminal possession of a hypodermic instrument. It is apparent that the Superintendent of Schools relied upon that portion of Board of Education Resolution No. 69-323 which mandates suspension of "any student upon his indictment or arraignment in any court...for any criminal act of a nature injurious to other students or school personnel..."

Education Law Section 3214 (6) (a) provides that suspension can only be invoked upon the following minors:

> "The school authorities, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:
>
> (1) A minor who is insubordinate or disorderly;
>
> (2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors;
>
> (3) A minor who, as determined in accordance with the providions of part one of this article, is feebleminded to the extent that he cannot benefit from instruction."

The respondents contend that the validity of the challenged resolution may not be lawfully determined in an article 78 proceeding and that petitioners have not exhausted their administrative remedies of appeal to the Commissioner of Education under Education Law Section 310.

It has been held that mandamus will lie commanding the admission to classes of an excluded pupil where the controversy turns on the interpretation of a statute. Crispell v. Rust, 149 Misc. 464, 267 N.Y.S. 656.

The cases cited by respondents are not applicable to the facts in the case before the court since those cases did not involve the interpretation of a statute.

The question which is raised in this proceeding is whether the respondents in suspending the infant petitioners under Resolution 69-323 of the New Rochelle Board of Education went beyond the powers conferred upon by the Superintendent of Schools and the Board of Education under section 3214 (6) (a) of the Education Law.

Respondents argue that the Resolution was within the powers conferred by section 2503 (2) (3) of the Education Law which gives power to the Board of Education to prescribe such regulations as may be necessary to make effectual the provisions of the Education Law for the general management operation, control, maintenance and discipline of the schools. Since section 3214 (6) (a) Education Law specifically defines the grounds for suspension of a student, the powers of the Board of Education are limited in suspension cases to these grounds.

The respondents allege that the Superintendent of Schools suspended petitioners for the reason that: "possession by a high school student of heroin and of a hypodermic syringe for injection of the drug into the bloodstream regardless of where offense is committed identified offender as a person whose conduct and mental condition endanger the safety, morals, health and welfare of other high school students with whom he would associate in the school."

While the use of heroin by students off the high school premises bears a reasonable relation to and may endanger the health, safety and morals of other students, the bare charges against petitioners of possession of heroin do not justify suspension of petitioners on the grounds set forth in section 3214 (6) (a) that they are insubordinate or disorderly; nor that their physical or mental condition endangers the health, safety or morals of themselves or other minors.

The court finds that the respondents have exceeded the powers conferred upon them by the Education Law in suspending the infant petitioners on the ground that they have been accused of possession of heroin. Until the legislature amends the Education Law, suspension of a student should be done pursuant to a strict interpretation and application of section 3214 (6) (a) of the Education Law.

The court need not decide the constitutional issues raised by petitioners since petitioners are entitled to the relief they seek on the ground that the New Rochelle Board of Education exceeded its powers under the Education Law in suspending the infant petitioners.

The application of the intervenors to intervene in this proceeding is denied. However, since it appears that the infant Douglas Herman was suspended for five (5) days for being charged with possession of marijuana off school grounds, and his suspension has terminated, his intervention herein is now moot, but based on the within decision, the record of his suspension should be expunged from the school records.

The petition is granted and the Board of Education of the City of New Rochelle is ordered to permit petitioners to attend New Rochelle High School forthwith as full time students and the record of their suspensions should be expunged from the school records.

Submit order on notice.

Dated: March 25, 1969

W. Vincent Grady
JUSTICE SUPREME COURT

TO: THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
Attorney for Petitioners
56 Grand Street
White Plains, New York 18601

GAYNOR, FREEMAN, GLICK, & PISANI, ESQS.
Attorneys for Intervenor-Petitioners
271 North Avenue
New Rochelle, New York

F. HARRY OTTO, ESQ.
Attorney for Respondents
271 North Avenue
New Rochelle, New York

PROBLEMS OF STUDENT DISCIPLINE AND CLASSROOM CONTROL

Roy Lucas*

Prepared for Presentation at the Spring Conference
of the National Association of Teacher Attorneys
Tuesday, May 5, 9:30 AM

I. INTRODUCTION

A. Student Discipline and Student Rights

An overview of the kinds of student discipline problems occurring today in elementary and secondary schools, and the impact of these problems upon the teacher.

B. Sources of Information

A guide to information and case law on student discipline issues and student rights:

THE LAW OF PUBLIC EDUCATION, E. Reutter & R. Hamilton, 1970, The Foundation Press, Inc., Mineola, New York;

PUBLIC SCHOOL LAW, K. Alexander, Ray Corns, and W. McCann, 1969, West Publishing Co., St. Paul, Minnesota;

EDUCATION LAW, G. Johnson, 1969, Michigan State University Press, East Lansins, Michigan;

STUDENT PROTEST AND THE LAW, G. Holmes, 1969, Institute of Continuing Legal Education, Hutchins Hall, Ann Arborn, Michigan;

The Pupil's Day in Court: Review of 19 __, yearly research report, published by the Research Division of the National Education Ass'n;

COLLEGE LAW BULLETIN, published monthly by the U. S. National Student Ass'n, 2115 "S" St., N. W., Washington, D. C. - Roy Lucas, Editor;

EDUCATION COURT DIGEST, published monthly, 1860 Broadway, New York, N. Y.;

NOLPE SCHOOL LAW REPORTS, published monthly, N. O. L. P. E., 825 Western Ave., Topeka, Kansas;

Goldstein, The Scope and Sources of School Board Authority: to Regulate Student Conduct: A Nonconstitutional Analysis, 117 U. Pa. L. Rev. 373-430 (1969);

Abbott, Due Process and Secondary School Dismissals, 20 W. Res. L. Rev. 378 (1969);

Brennan, Education and the Bill of Rights, 113 U. Pa. L. Rev. 219 (1964);

Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969);

C. Historical Concepts of Student Discipline; In loco parentis; Reasonable Rules; Relevant Punishments

D. Sources of Law

(1) In loco parentis - parental rights
(2) Contract
(3) Fiduciary
(4) Constitutional Law
(5) Statute or local board rules

E. Jurisdiction in Student Cases

II. PROCEDURAL RIGHTS OF STUDENTS

A. Right to Hearing Before Severe Disciplinary Action
No applicable decision by U. S. Supreme Court or U. S. Court of Appeals in High School or Elementary School Case

Vought v. Van Buren Public Schools,
306 F. Supp. 1388 (E. D. Mich. 1969);

Sullivan v. Houston Indep. School Dist.,
307 F. Supp. 1328 (S. D. Tex. 1969);

Knight v. Board of Education of the City of New York,
48 F. R. D. 108 (E. D. N. Y. 1969);

Geiger v. Milford School Dist.,
51 D. & C. 647 (Pa. County Ct., Pike Cty 1944);

Woods v. Wright,
334 F. 2d 369 (5th Cir. 1964);

Relevant higher education decisions include:

Dixon v. Alabama Bd. of Educ.,
294 F. 2d 150 (5th Cir.), cert. denied, 368 U. S. 930 (1961);

Wright v. Texas Southern Univ.,
392 F. 2d 728 (5th Cir. 1968);

Stricklin v. Regents of the Univ. of Wis.,
297 F. Supp. 416 (W. D. Wis. 1969), appeal dismissed as moot, 420 F. 2d 1257 (7th Cir. 1970);

Marzette v. McPhee,
294 F. Supp. 562 (W. D. Wis. 1968);

Compare Wheeler v. Montgomery,
397 U. S. ___, 38 U. S. L. W. 4230 (Mar. 23, 1970);

See generally Abbott, Due Process and Secondary School Dismissals, 20 W. Res. L. Rev. 378 (1969); Note, Procedural Rights of Public School Children in Suspension-Placement Proceedings, 41 Temp. L. Q. 349 (1968); Note, 14 Kans. L. Rev. 108 (1965).

B. Rights to Notice of Charges, Offense, Rule Violated, and Adverse Evidence

See cases cited immediately above.

See also Hopkins v. Ayres, ____ F. Supp. _____, No. WC 6974-S (N. D. Miss. Oct. 24, 1969);

Esteban v. Central Mo. State College, 277 F. Supp. 649 (W. D. Mo. 1967);

Cf. Kelley v. Metropolitan Bd. of Educ., 293 F. Supp. 485 (M. D. Tenn. 1968)

C. Right to Fair and Impartial Hearing

No decision on impartiality in high school disciplinary cases.

Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967);

Compare Pickering v. Board of Educ., 391 U. S. 563, 578 n. 2 (1968) (dictum);

But see Barker v. Hardway, 283 F. Supp. 228 (S. D. W. Va.), aff'd, 399 F. 2d 638 (4th Cir. 1968) (per curiam), cert. denied, 394 U. S. 905 (1969); and
Jones v. Tenn. Bd. of Educ., 407 F. 2d 834 (6th Cir. 1968), cert. granted, 396 U. S. 817 (1969), writ dismissed as improvidently granted, 397 U. S. ___ (1970);

See generally Comment, Prejudice and the Administrative Process, 59 Nw. U. L. Rev. 216 (1964)

D. Right to Representation by Retained Legal Counsel

Cf. Madera v. Board of Educ. of City of New York, 267 F. Supp. 356 (S. D. N. Y.), rev'd, 386 F. 2d 778 (2d Cir. 1967), cert. denied, 390 U. S. 1028 (1968) (counsel in guidance conference);

Goldwyn v. Allen
54 Misc. 2d 94, 281 N.Y.S. 2d 899 (Sup. Ct., Queens County 1967);

Cf. French v. Bashful,
303 F. Supp. 1333 (E.D. La. 1969);

Zanders v. Louisiana State Bd. of Educ.,
281 F. Supp. 747, 752 (E.D. La. 1968);

Esteban v. Central Mo. State College,
277 F. Supp. 649, 651 (W.D. Mo. 1967);

Contra, Barker v. Hardway, 283 F. Supp. 228 (W.D. W.Va. 1968);
Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967)

E. Right to Confront and Question Accusers

Cf. Esteban, *supra*;

F. Privilege Against Self-Incrimination

Goldwyn v. Allen,
54 Misc. 2d 94, 281 N.Y.S. 2d 899
(Sup. Ct. Queens County 1967);

Furutani v. Ewigleben,
297 F. Supp. 1163 (N.D. Calif. 1969);

Compare Spevack v. Klein,
385 U.S. 511 (1967); Gardner v. Broderick,
392 U.S. 273 (1968); In Re Gault, 387 U.S. 1 (1967);

III. SUBSTANTIVE RIGHTS OF STUDENTS

A. Freedom of Expression, Petition, and Assembly

Tinker v. Des Moines Indep. Community School Dist.,
393 U.S. 503 (Feb. 24, 1969);

West Virginia Board of Education v. Barnette,
319 U. S. 624 (1943);

Burnside v. Byars,
363 F. 2d 744 (5th Cir. 1966);

Blackwell v. Issaquena County Board of Education,
363 F. 2d 749 (5th Cir. 1966);

Jones v. Tennessee Board of Education,
407 F. 2d 834 (6th Cir.), cert. granted,
396 U. S. 817 (1969), writ dismissed as improvidently granted, 397 U. S. ___ (1970);

Norton v. Discipline Comm. of East Tenn. State Univ.,
419 F. 2d 195 (6th Cir. 1969), petition for cert. filed,
38 U. S. L. W. 3306 (U. S. Dec. 29, 1969) (No. 1011);

Esteban v. Central Mo. State College,
415 F. 2d 1077 (8th Cir. 1969), petition for cert. filed,
38 U. S. L. W. 3331 (U. S. Jan. 2, 1970) (No. 1026);

Saunders v. VPI,
417 F. 2d 1127 (4th Cir. 1969);

Frain v. Baron,
307 F. Supp. 27 (E. D. N. Y. 1969);

Sheldon v. Fannin,
221 F. Supp. 766 (D. Ariz. 1963);

Butts v. Dallas Indep. School Dist.,
306 F. Supp. 488 (N. D. Tex. 1969);

Compare Pickering v. Board of Education,
391 U. S. 563 (1968); Puentes v. Board of
Education, 24 N. Y. 2d 996, 250 N. E. 2d 232,
302 N. Y. S. 2d 824 (1969);

Brown v. Greer,
296 F. Supp. 595 (S. D. Miss. 1969);

Einhorn v. Maus,
300 F. Supp. 1169 (E. D. Pa. 1969);

See generally Aldrich, Freedom of Expression in Secondary Schools, 19 Cleve-St. L. Rev. 165 (1970);

Note, Symbolic Speech, High School Protest and the First Amendment, 9 J. Fam. Law 119 (1969);

B. Freedom of the Press and Other Media

Distribution

Note the applicability of cases cited above.

Scoville v. Board of Educ.,
415 F. 2d 860 (7th Cir. 1969), rev'd on rehearing, ____ F. 2d ____,
No. 17190 (7th Cir. Apr. 1, 1970) (en banc);

Vought v. Van Buren Public Schools,
306 F. Supp. 1388 (E. D. Mich. 1969);

Sullivan v. Houston Indep. School Dist.,
307 F. Supp. 1328 (S. D. Tex. 1969);

Schwartz v. Schuker,
298 F. Supp. 238 (E. D. N. Y. 1968);

Dickey v. Alabama Bd. of Educ.,
273 F. Supp. 613 (M. D. Ala. 1967), vacated as moot,
402 F. 2d 515 (5th Cir. 1968);

Antonelli v. Hammond,
____ F. Supp. ____, Civ. No. 69-1128-G (D. Mass. Feb. 5, 1970);

Access

Lee v. Board of Regents,
306 F. Supp. 1097 (W. D. Wis. 1969);

Zucker v. Panitz,
299 F. Supp. 102 (S. D. N. Y. 1969);

But see Panarella v. Birenbaum,
60 Misc. 2d 95, 302 N. Y. S. 2d 427 (Sup. Ct. Richmond County 1969);

See generally Nahmod, Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools, 51 Chi. Bar Rec. 144 (Dec. 1969); Also: Beyond Tinker: The High School As An Educational Forum, 5 Harv. Civ. Rts. L. Rev. 278 (1970)
High School Students are Rushing Into Print, and Court, Nations Schools, p. 30 (Jan. 1969).

C. Freedom of Association: Political and Social

Hughes v. Caddo Parish School Bd.,
57 F. Supp. 508 (W. D. La. 1944), aff'd mem., 323 U. S. 685 (1945);

Waugh v. Board of Trustees,
237 U. S. 589 (1915);

Compare NAACP v. Alabama ex rel. Patterson,
357 U. S. 449 (1958);

Shelton v. Tucker,
364 U. S. 479 (1960);

Bates v. City of Little Rock,
361 U. S. 516 (1960);

See generally Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1 (1964).

D. Freedom from Vague, Uncertain, and Sweeping Disciplinary Rules

Sullivan v. Houston Indep. School Dist.,
307 F. Supp. 1328 (S. D. Tex. 1969);

Soglin v. Kauffman,
295 F. Supp. 978 (W. D. Wis. 1968), aff'd, 418 F. 2d 163 (7th Cir. 1969);

Cf. Scott v. Alabama Bd. of Educ.,
300 F. Supp. 163 (M. D. Ala. 1969);

Meyers v. Arcata Union High School Dist.,
269 Cal. App. 2d ____, 75 Cal. Rptr. 68 (Dist. Ct. App. 1969),
hearing denied mem. (Cal. Sup. Ct. Apr. 9, 1969);

But see Esteban v. Central Mo. State College,
415 F. 2d 1077 (8th Cir. 1969), petition for cert. filed,
38 U. S. L. W. (U. S.) (No.);

Norton v. Discipline Comm. of East Tenn. State Univ.,
419 F. 2d 195 (6th Cir. 1969), petition for cert. filed,
38 U. S. L. W. (U. S.) (No.);

See generally Note, Uncertainty in College Disciplinary
Regulations, 29 Ohio St. L. J. 1023 (1968).

IV. STUDENT DRESS CODES AND REGULATIONS

Supreme Court Review Denied on Three Occasions

Kahl v. Breen,
296 F. Supp. 702 (W. D. Wis.), aff'd, 419 F. 2d 1035 (7th Cir. 1969),
petition for cert. filed, 38 U. S. L. W. 3348 (U. S. Mar. 10, 1970)
(No. 1274);

Ferrell v. Dallas Indep. School Dist.,
261 F. Supp. 545 (N. D. Tex. 1967), aff'd, 392 F. 2d 697 (5th Cir.)
(2-1), cert. denied, 393 U. S. 856 (1968);

Akin v. Board of Educ.,
262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (Dist. Ct. App. 1968),
hearing denied mem. (Cal. Sup. Ct. July 10, 1968) (Peters, J.,
dissenting), cert. denied, 393 U. S. 1041 (1969);

Marshall v. Oliver,
No. B-2932 (Cir. Ct. Richmond, Virginia, Dec. 20, 1965),
cert. denied, 385 U. S. 945 (1966);

Historical Context

Ho Ah Kow v. Nunan,
12 Fed. Cas. 252 (No. 6546) (C. C. D. Calif. 1879);

Valentine v. Indep. School Dist. of Casey,
187 Iowa 555, 174 N.W. 334 (1919);

Pugsley v. Sellmeyer,
158 Ark. 247, 250 S.W. 538 (1923);

Recent Decisions Favoring Students

Kahl v. Breen, supra;

Sims v. Colfax Community School Dist.,
307 F. Supp. 485 (S.D. Iowa 1970) (hair length of female student);

Cabillo v. San Jacinto Junior College,
305 F. Supp. 857 (S.D. Tex. 1969) (bearded college student);

Olff v. East Side Union H.S. Dist.,
305 F. Supp. 557 (N.D. Calif. 1969) (male hair length);

Richards v. Thurston,
304 F. Supp. 449 (D. Mass. 1969);

Griffin v. Tatum,
300 F. Supp. 60 (M.D. Ala. 1969);

Westley v. Rossi,
305 F. Supp. 706 (D. Minn. 1969);

Miller v. Gillis,
_______ F. Supp. _____, No. 69 C 1841 (N.D. Ill. Sept. 25, 1969);

Hopkins v. Ayres,
______F. Supp. _____, No. WC 6974-S (N.D. Miss. Oct. 25, 1969);

Zachry v. Brown,
299 F. Supp. 1360 (N.D. Ala. 1967);

Yoo v. Moynihan,
28 Conn. Super. 375, 262 A.2d 814 (Super. Ct. Hartford County, 1970);

Scott v. Board of Educ.,
61 Misc. 2d 333, 305 N.Y.S. 2d 601 (Sup. Ct., Nassau County 1969)
(dress code forbidding slacks);

Recent Decisions Adverse to Students

Ferrell, Akin, and Marshall, supra;

Davis v. Firment,
408 F. 2d 1085 (5th Cir. 1969) (per curiam);

Jackson v. Dorrier,
____ F. 2d ____ No. 19, 351 (6th Cir.) (pending);

Crews v. Clones,
303 F. Supp. 1370 (S. D. Ind. 1969);

Brick v. Board of Educ.,
305 F. Supp. 1316 (D. Colo. 1969);

Stevenson v. Wheeler County Bd. of Educ.,
306 F. Supp. 97 (S. D. Ga. 1969);

Contreras v. Merced Union H. S. Dist.,
E. D. Calif. Dec. 13, 1968) (not reported);

Shows v. Freeman,
230 So. 2d 63 (Miss. 1969);

Leonard v. School Comm. of Attleboro,
349 Mass. 704, 212 N. E. 2d 468 (1965);

Canney v. Board of Public Instruction,
231 So. 2d 34 (Fla. Ct. App. 1970);

See generally Notes, 15 S. D. L. Rev. 94 (1970); 42 So. Calif. L. Rev. 126 (1969); 18 Cleve-Marq. L. Rev. 143 (1969); 17 J. Pub. Law 151 (1968); 20 Ala. L. Rev. 104 (1967); 37 U. Colo. L. Rev. 492 (1965).

V. STUDENT PRIVACY : SEARCH AND SEIZURE

Phillip v. Johns,
12 Tenn. App. 354 (Mid. Sec. Ct. App. 1930);

Stein v. Kansas,
203 Kans. 638, 456 P. 2d 1 (1969),
cert. denied, 397 U. S. ____ (1970);

Overton v. New York,
24 N. Y. 2d 522, 249 N. E. 2d 366, 301 N. Y. S. 2d 479 (1969),
adhered to, ____ F. Supp. ____, 69 Civ. 40006 (S. D. N. Y. Apr. 7, 1970)
(Cooper, J.) (appeal pending);

In re Donaldson,
269 Cal. App. 2d ___, 75 Cal. Rptr. 220 (Dist. Ct. App.),
hearing denied (Cal. Sup. Ct. Apr. 2, 1969);

People v. Kelly
195 Ca. App. 2d 72, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961);

But see People v. Cohen,
57 Misc. 2d 366, 292 N. Y. S. 2d 706 (Sup. Ct., Nassau County 1968);

Compare Camara v. Municipal Court, 387 U. S. 523 (1967);
Stoner v. California, 376 U. S. 483 (1964); Spevack v. Klein,
385 U. S. 511 (1967); Finn's Liquor Shop v. New York State
Liquor Authority, 24 N. Y. 2d 647, 249 N. E. 2d 440, 301 N. Y. S. 2d 584,
cert. denied, 396 U. S. 840 (1969); Colonnade Catering Corp. v.
United States, 397 U. S. ____ (1970);

See generally Notes, 17 Kans. L. Rev. 512 (1969); 3 Georgia L. Rev.
426 (1969); 4 U. San Fran. L. Rev. 49 (1969); 9 Santa Clara L. Rev.
143 (1968); 4 J. Fam. Law 151 (1964); J. Landynski, Search & Seizure
and the Supreme Court 13-61, 245-62 (1966).

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JON EISNER ET AL.,
Plaintiffs
v.
THE STAMFORD BOARD OF
EDUCATION ET AL.,
Defendants

CIVIL NO. 13220

MEMORANDUM OF DECISION

The parties' cross motions for summary judgment present the question whether a student newspaper may be distributed in a public high school without the necessity of it being submitted to the shcool administration for prior approval of its contents.

I.

The pertinent facts are undisputed. The plaintiffs, students at Rippowam High School, a public high school in Stamford, Connecticut, are authors and publishers of an independent mimeographed newspaper entitled "Stamford Free Press." The newspaper is printed at the students' expense and expresses their views upon current controversial subjects. Three issues of the newspaper were distributed beyond school limits without incident. After there was an attempt to circulate a fourth issue on school grounds, school officials, named defendants herein, warned the students they would be suspended if the activity continued. In existence at the time was a regulation passed by the Board of Education which prohibited "using pupils for communications." When negotiations between the students and administration failed to resolve the dispute, this suit was instituted on June 23, 1969.

Thereafter, on November 18, 1969, the Board of Education restated its policy on the matter with the following enactment:

> Distribution of Printed or Written Matter
>
> The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations:
>
> > No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.
>
> In granting or denying approval, the following guidelines shall apply:
>
> > No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

The plaintiffs contend this regulation contravenes the guarantee of freedom of speech and press under the First Amendment. The defendants, on the other hand, argue that the regulation is a valid exercise of the Board's inherent power to impose prior restraints on the conduct of school children.

II.

At the outset it is important to stress what is not contested in this lawsuit. The plaintiffs acknowledge that the school authorities may, and indeed must at times, control the conduct of students. To this end the administration has the power and the duty to promulgate rules and the appropriate guidelines for their for their application. More specifically with respect to this case, the plaintiffs concede the defendants possess the authority to establish reasonable regulations concerning the time, exact place in the school, and the manner of distribution of the newspaper, and to insist that each article identify its author.

Moreover, the plaintiffs do not challenge the Board's power to issue guidelines on the permissible content of the newspaper. For example, they do not object to a prohibition of obscene or libelous material. They further recognize that the Board has the duty to punish "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others ....." Tinker v. Des Moines School District, 393 U.S. 503, 513 (1969).

The only issue before the Court concerns the constitutional validity of the requirement that the content of the literature be submitted to school officials for approval prior to distribution.

III.

Viewing the regulation in question solely on its face, it seems clear to the Court that the regulation is a classic example of prior restraint of speech and press which constitutes a violation of the First Amendment. In Near v. Minnesota, 283 U.S. 697 (1931), the Supreme Court stated:

> The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to

> prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure fore criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases befor the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." . . . . . The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." . . . This court said, in Patterson v. Colorado, 205 U.S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . ."
>
> 283 U.S. at 713-714.

The Court then further confirmed that: ..." [L]liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." Id. at 716.

See also Lovell v. Griffin, 303 U.S. 444 (1938).

Although no case precisely on point has been found, several recent rulings give strong support to this Court's opinion. In Antonelli v. Hammond, ______ F. Supp. __________ (D. Mass. February 5, 1970), Judge Garrity in a reasoned opinion held that the prior submission to a faculty advisory board of material intended to be published in the student newspaper of a state college cannot be constitutionally required. In Zucker v. Panitz, ______ F. Supp. ______ (S.D.N.Y. 1969), a summary judgment was granted enjoining a high school principal from interfering with the right of students to place advertisements of their political views on the Vietnam conflict in the school newspaper. And in Brooks v. Auburn University, 296 F. Supp. 188 (M.D.Ala. 1969), the court observed, at 196, that: "...(t)he State of Alabama cannot, through the President of Auburn University, regulate the content of the ideas students may hear. To do so is illegal and thus unconstitutional censorship in its rawest form." See also Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (S.D.Tex. 1969).

IV.

The right of students to freedom of expression, however, is not absolute. The "heavy presumption" against restrictive regulations on free speech and press, Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963), may be overcome "in carefully restricted circumstances." Tinker v. Des Moines School District, supra at 513. School administrations of necessity must have wide latitude in formulating rules and guidelines to govern student conduct within the school. If there is "a specific showing of constitutionally valid reasons to regulate their speech," Id. at 511 , students must conform to reasonable regulations which intrude on that freedom. Free speech is subject to reasonable restrictions as to time, place, manner and duration. Id. at 512-513. See also Shuttleworth v. Birmingham, 382 U.S. 87 (1965): Cox v. Louisiana, 379 U.S. 536 (1965).

In the present case, the defendants have not produced a scintilla of proof which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings. The contents of the issues of the "Stamford Free Press" submitted to the Court are infinitely less objectionable than the underground newspaper "Grass High," involved in Scoville v. Board of Education, ____F. 2d____(7 Cir. 1970), and the personal conduct and attitude of the plaintiffs herein have been commendable.

Moreover, even assuming the defendants carried their burden and demonstrated the necessity for prior restraint, the regulations provide none of the procedural safeguards designed to obviate the dangers of a censorship system. Freedman v. Maryland, 380 U.S. 51, 58 (1965). Cf. Powe v. Miles, 407 F.2d 73, 84 (2 Cir. 1968). Among other things, the regulations do not specify the manner of submission, the exact party to whom the material must be submitted, the time within which a decision must be rendered; nor do they provide for an adversary proceeding of any type or for a right of appeal.

V.

Finally, the Court is convinced that reasonable regulations can be devised to prevent to prevent disturbances and distractions in Rippowam High School and at the same time protect the rights of the plaintiffs to express their views through their newspaper. The Board of Education has the duty under the Connecticut law, and the right under Tinker, to punish "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Tinker at 513. But this right and duty does not include blanket prior restraint; the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young. Cf. Terminiello v. Chicago, 337 U.S. 1 (1949).

The remedy for today's alienation and disorder among the young is not less but more free expression of ideas. In part, the First Amendment acts as a "safety valve" and tends to decrease the resort to violence by frustrated citizens. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Emerson, Toward a General Theory of the First Amendment 11-15 (1967). Student newspapers are valuable educational tools, and also serve to aid school administrators by providing them with an insight into student thinking and student problems. They are valuable peaceful channels of student protest which should be encouraged, not suppressed.

Accordingly, for the reasons stated, the Court hereby grants plaintiffs' motion for summary judgment.

Dated at New Haven, Connecitcut, this 2nd day of July, 1970.

Robert C. Zampano
United States District Judge

APPENDIX

II. CORPORAL PUNISHMENT

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

WILLIE MURPHY; RACHAEL RUFFIN, a minor, by her mother and next friend, WILLIE MURPHY; AGNESS WATTS; JEANNETTE WATTS and JAMES WATTS, minors, by their mother and next friend, AGNES WATTS; ROSE HICKS; MARGARET POPULO, a minor by her mother and next friend, ROSE HICKS.

Plaintiffs

vs.

JOHN T. KERRIGAN, individually, and in his capacity as Chairman of the Boston School Committee; THOMAS S. EISENSTADT, JOSEPH LEE, PAUL F. McDEVITT and PAUL T. TIERNEY individually, and in their capacity as members of the Boston School Committee; WILLIAM OHRENBERGER, individually, and in his capacity as Superintendent of the Boston Public Schools; JOSEPH McDONOUGH, individually, and in his capacity as principal of the Patrick F. Gavin School; and EDWARD SULLIVAN, HARVEY BERLIN and FRANK CELONA, individually, and in their capacity as teachers in the Boston school system.

CIVIL ACTION
No. CA-69-1174-W

AMENDED COMPLAINT

1. PRELIMINARY STATEMENT

In this civil action, parents and students seek a declaration that corporal punishment in the public schools is unconstitutional, and they seek to invoke this Court's equitable powers to prevent the further use of corporal punishment in the Patrick F. Gavin School, a public junior high school within the city of Boston.

2. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. SS1331, 1343 (3), and 1343 (4). This action arises under the First, Fourth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C.A. S1983. The matter in controversy exceeds the sum of $10,000 exclusive of interests and costs. The action seeks injunctive and damage relief pursuant to 42 U.S.C.A. S1983 and declaratory relief pursuant to 28 U.S.C.A. SS2201 and 2202.

3. PARTIES

A. Plaintiffs

All plaintiffs are citizens of the United States and of the Commonwealth of Massachusetts and reside in the City of Boston. All minor plaintiffs are students at the Patrick F. Gavin School.

(1) Rachael Ruffin is a minor girl and Willie Murphy is her mother and next friend.

(2) Jeannette Watts is a minor girl and James Watts is a minor boy and Agnes Watts is their mother and next friend.

(3) Margaret Populo is a minor girl and Rose Hicks is her mother and next friend.

B. Administrative Defendants

(1) Defendants Eisenstadt, Kerrigan, Lee, McDevitt and Tierney are the sole current members of the Boston School Committee, the governmental body charged with general responsibility for the operation and management of all public schools in the City of Boston, M.G.L.A. Chapter 71, Section 35 et. seq.

(2) Defendant William Ohrenberger is the Superintendent of the Boston Public Schools and thereby the chief executive officer of the School Committee, responsible for the general management and supervision of the Boston Public Schools. M.G.L.A. Chapter 71, Section 59.

(3) Defendant Joseph McDonough is a Principal duly appointed by the Boston School Committee and assigned to the Patrick F. Gavin School, a public school under the control and within the jurisdiction of the Boston School Committee.

C. Teacher Defendants

(1) Defendant Edward Sullivan is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

(2) Defendant Harvey Berlin is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

(3) Defendant Frank Celona is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

4. CLASS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs sue on their own behalf and on behalf of others similarly situated. The class represented by plaintiffs consists of approximately 1,235 students, the parents of said students in the Patrick F. Gavin school, and all those persons who may become students and parents of students at the Patrick F. Gavin School. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The representative plaintiffs will fairly and adequately protect the interests of the class. The parties defendant have acted or refused to act on grounds generally applicable to all persons within the class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. STATEMENT OF FACTS

All incidents of corporal punishment and abuse described in this complaint occurred at the Patrick F. Gavin School while school was in session. All teacher defendants' conduct was undertaken in their capacity as teachers and under color of state law. All teacher defendants inflicted corporal punishment maliciously, in bad faith, and with full knowledge that their conduct violated school department Regulations and/or other laws. All corporal punishment inflicted was excessive and not a proportionate response to any conduct of the plaintiff students. All administrative defendants knew or should have known that corporal punishment was and is inflected in the Patrick F. Gavin School and all administrative defendants failed to take appropriate action to insure the cessation of corporal punishment.

(A) On June 5, 1969, plaintiff Rachael Ruffin was 13 years old and was an eighth grade student at the Patrick F. Gavin School. On or about that date, teacher defendant Edward Sullivan pushed and slapped Rachael Ruffin allegedly for school disciplinary reasons.

(B) On or about June 6, 1969, plaintiff Willie Murphy met with defendant Joseph McDonough, principal of the Gavin School at his office to discuss the beating defendant Sullivan had given her daughter Rachael Ruffin the day before.

At this meeting, Teacher defendant Edward Sullivan, in the presence of defendant McDonough, grabbed and shook plaintiff Willie Murphy and subjected her to verbal abuse.

(C) On October 29, 1969, plaintiff Jeannette Watts was 14 years old and a student at the Patrick F. Gavin School. On or about that date teacher defendant Edward Sullivan struck Jeannette Watts allegedly for school disciplinary reasons.

(D) On or about the same date, teacher defendant Harvey Berlin roughly grabbed Jeannette Watts and slapped her allegedly for school disciplinary reasons.

(E) On October 29, 1969, plaintiff James Watts was 13 years old and a student at the Patrick F. Gavin School. On or about that date, teacher defendant Frank Celona struck James Watts on his hands with a rattan allegedly for disciplinary reasons. No principal or teach was present when this punishment was inflicted.

(F) On or about the same date, teacher defendant Edward Sullivan struck, grabbed, pushed, and verbally abused James Watts allegedly for school disciplinary reasons.

(G) On October 29, 1969, plaintiff Margaret Populo was 14 years old and a ninth grade student at the Patrick F. Gavin School. On or about that date, teacher defendant Harvey Berlin struck plaintiff Populo allegedly for school disciplinary reasons.

(H) Teacher defendants and/or other teachers in the Patrick F. Gavin School have inflicted and continue to inflict corporal punishment upon other plaintiffs within the class. Because corporal punishment is and has been regularly utilized as a means of discipline within the Patrick F. Gavin School, the plaintiffs believe and fear that its use will continue unless this Court intervenes and enjoins the future use of corporal punishment.

(I) At all times material herein, administrative defendants have authorized corporal punishment for: "Disciplinary reasons"...[in] extreme cases...' Boston School Committee Regulations 211.5-211.7 (attached hereto as Exhibit A and incorporated by reference herein).

(J) Defendants failed to make available any procedural safeguards to plaintiff students before inflicting corporal punishment on them in this case:

1. Defendants failed to notify plaintiff students of what, if any, misconduct they had allegedly engaged in sufficiently before any hearing so that plaintiffs might have had time to prepare their defense.

2. Defendants failed to give plaintiffs any opportunity for a hearing, however informal, to present their side of the alleged misconduct before an impartial referee.

3. Defendants failed to give plaintiffs any opportunity to present witnesses or other evidence in their defense.

4. Defendants failed to give plaintiffs any opportunity to question or cross examine any witnesses against them.

5. Defendants failed to give plaintiffs any opportunity to be represented in any hearing by attorneys, parents, friends or any other person.

6. Defendants failed to notify plaintiff students that they had rights to notice of charges, hearing, and representation.

6. CAUSE OF ACTION

Defendants' conduct in executing, permitting, and/or failing to prevent the inflicting of corporal punishment at the Patrick F. Gavin School violate the Constitution of the United States for the following reasons:

A. The infliction of corporal punishment by public school officials on public school students on its face abridges the"privileges and immunities" of all such students as well as plaintiff students on the facts in this case including their rights to physical integrity, dignity of personality and freedom from arbitrary authority in violation of the Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

B. The infliction of corporal punishment on its face "deprives" all public school students as well as plaintiffs on the facts of this case of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious and unrelated to achieving any legitimate educational purpose. On the contrary, the use of corporal punishment in the schools results in a hostile reaction to authority, breeds further violence and interferes with the educational process and academic inquiry.

C. The infliction of corporal punishment on public school students on its face constitutes "cruel and unusual punishment" as well as the facts of this case, since it was grossly disproportionate to any misconduct plaintiff students may have engaged in, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

D. The standards adopted by the defendants with respect to inflicting corporal punishment on students:

1. are arbitrary, not rationally related to any legitimate educational purposes and destructive of the educational process;

2. are vague, fail to provide students adequate notice of the prohibited conduct and permit arbitrary enforcement;

3. are overbroad, penalize student conduct protected by the First Amendment and chill the exercise of First Amendment Freedoms; all in violation of the Due Process clause of the Fourteenth Amendment;

5. constitute "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments.

E. Defendants' failure to provide plaintiff students in this case any procedural safeguards before inflicting corporal punishment on them, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights constituted summary punishment and "deprived" plaintiffs of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution.

F. Defendants' conduct in inflicting corporal punishment on female plaintiffs Rachael Ruffin, Jeannette Watts and Margaret Populo, violated the express provisions of Boston School Committee Regulations which prohibit corporal punishment of girls. The infliction of punishment on male plaintiff James Watts also violated these Regulations because it was excessive, no faculty witness was present and his conduct was not "extreme."

7. IRREPARABLE INJURY

Defendants' past and continuing infliction of corporal punishment on plaintiffs and their class caused and will continue to cause great and irreparable injury to plaintiffs and their class by greatly damaging their education, causing them severe and permanent physical and emotional injury, violating their physical integrity, and destroying their dignity of personality. Further, defendants' past and continuing infliction of corporal punishment on plaintiffs and their class will irreparably injure plaintiffs' fundamental Constitutional rights to be free from arbitrary and capricious governmental actions and irreparably injure the public's interest in ensuring that its fundamental laws are obeyed by government.

8. INADEQUATE LEGAL AND ADMINISTRATIVE REMEDIES

Plaintiffs have no adequate legal or administrative remedies.

WHEREFORE, plaintiffs pray for relief as follows:

1. That a temporary restraining order, preliminary and permanent injunction issue, enjoining and restraining order, preliminary and permanent injunction issue, enjoining and restraining the defendants, their agents, servant and employees from inflicting any form of corporal punishment upon any student at the Patrick F. Gavin School.

2. That a declaratory judgment issue declaring that the Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution prohibits any form or corporal punishment upon any student at the Patrick F. Gavin School.

3. That this Court appoint a special Master to the Patrick F. Gavin School to insure that this Court's orders are enforced and to insure that the Constitutional rights of the plaintiffs are fully respected.

4. That the Master be directed to implement a mechanism for receiving complaints against teachers along the lines of the plan set forth in Exhibit B attached hereto and incorporated by reference herein.

5. That judgment be entered against the defendants, jointly and severally, of $25,000 as to each plaintiff as compensatory and punitive damages, plus interest and costs.

6. For such other relief as the Court deems appropriate.

By their attorneys,

Michael L. Altman
Boston Legal Assistance Project
474 Blue Hill Avenue
Roxbury, Mass. 02121
442-0211

James W. Dolan
Boston Legal Assistance Project
482 Broadway
South Boston, Mass. 02127
268-2272

Gershon Ratner
Boston Legal Assistance Project
84 State Street
Boston, Mass. 02109
742-8930

EXHIBIT A
Boston School Committee Regulations
in effect during 1968-69 and 1969-70 school years

Strike out Sections 209 to 215, inclusive, and substitute in place thereof the following:

Sect. 209.1 Every pupil must come to school clean in his person and properly dressed. The head master or principal may require a pupil to present himself in such dress and personal appearance as shall not be detrimental to the best interests of the school.

2. The possession of switch knives, garrison belts, metallic knuckles, firearms, or any other dangerous weapon is forbidden by law. A pupil who violates this criminal law shall be liable to suspension or expulsion.

Sect. 210.1 Tardiness, unless satisfactorily explained, shall be subject to a proper penalty. Tardy pupils shall present on the next school day an excuse in writing from their parents or guardians, but shall not be sent home to obtain such an excuse. The principal or teacher in charge of a building may request the presence of a parent of a pupil who is frequently tardy.

Sect. 211.1 Before making a final decision in regard to disciplinary action taken by a teacher, the head master or principal shall consult with the teacher concerned and, if necessary, with the pupil and his parent. In problems concerning pupil conduct, the classroom teacher should exercise the authority proper to a parent of good judgment. Although the head master or principal should assist the teacher to meet disciplinary problems, the responsibility for the correction of classroom behavior is the teacher's.

2. The confinement of pupils in a closet or wardrobe, or the exclusion of a pupil to a corridor or any other unsupervised area, or the use on the part of the teacher of sarcastic or discourteous language is forbidden.

3. No physical restraint of any kind shall be used in a kindergarten.

4. A teacher may temporarily exclude from the classroom to the office of the head master or principal a pupil whose continuous misbehavior is such as to prevent a teaching-learning situation for the class. Such exclusion shall continue, but for not more than one school day, until the head master or principal has consulted with the teacher regarding the pupil's status. A pupil who is excluded from the classroom shall be escorted to the office of the head master or principal or to whatever supervised area may be designated by the head master or principal.

5. Corporal punishment may be administered for disciplinary reasons by any teacher or principal. Corporal punishment shall be restricted to boys in day elementary and junior high schools and in the M. Gertrude Godvin School; shall be confined to blows on the hand with a rattan and in the presence of a competent witness, who shall be either the principal or a teacher designated in sight of other pupils; provided, that corporal punishment shall not be inflicted when it might aggravate an existing physical impairment or produce permanent or lasting

injury; provided further, that it shall be resorted to only in extreme cases and after the nature of the offense has been fully explained to the offending pupil. Violent shaking or other gross indignities are expressly forbidden.

6. Cases of corporal punishment shall be reported by each teacher on the dates of their occurrence, in writing to the principal of the district These reports shall state the name of the pupil, the name of the witness, the amount of punishment, and the reason therefor. These reports, together with those cases of corporal punishment inflicted by the principals, shall be kept on file for two years, at the expiration of which time they shall be destroyed.

7. The number of cases of corporal punishment, by whomsoever inflicted, shall be reported by the respective principals monthly in writing to the superintendent and to the assistant superintendent in charge.

Sect. 212.1 Any pupil may be detained (with the approval of the principal), at the close of the session in day elementary or junior high schools for a period not exceeding one hour to make up imperfect lessons, but such detention shall be only on account of the pupil's fault or neglect.

2. A pupil may be barred from participation in extracurricular activities if, in the opinion of the headmaster or principal, he has failed to maintain a satisfactory standard of conduct or scholarship.

3. Pupils in Latin and day high schools whose scholarship or conduct is unsatisfactory may be required to return to school after the close of the regular session for a period not exceeding two hours daily.

Sect. 213.1 A head master or principal, in the case of a pupil under sixteen years of age who is a chronic school offender, may transfer, with the approval of the superintendent, such pupil to the M. Gertrude Godvin School for continued or flagrant violations of ordinary school discipline and good behavior.

Sect. 214.1 A pupil who shall in any manner wilfully deface or otherwise injure any portion of a school estate; or write any profane or indecent language or make any obscene characters on school premises; or who shall distribute or possess any obscene pictures or any obscene material, shall be liable to suspension, expulsion or other punishment according to the nature of the offense.

2. A pupil who defaces, loses, or destroys any book, apparatus, or other property belonging to the City shall be required to replace the same or make good the cost of such replacement.

Section 215

215.1 Any student, after the chronological age of sixteen years, who fails four or more major subjects for three successive bi-monthly marking periods, and whose conduct is unsatisfactory in the opinion of the head master or principal, may be suspended, except in those cases where the failure is due to excused and legitimate absence from school or where there exist extenuating circumstances. If the pupil so suspended is not reinstated within five school days from the date of his original suspension, then the matter shall be referred in writing by the head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within ten school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent, and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.2 A head master or principal may suspend a school offender who is over sixteen years of age for continued flagrant violations or ordinary school discipline and good behavior. During the period of suspension, the head master or principal may refuse, after conference with the parents, to reinstated within five school days from the date of his original suspension, then the matter shall be referred in writing by the head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within ten school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.3 A head master or principal may suspend a school offender who is under sixteen years of age for violent or pointed opposition to authority or for continued or flagrant violations of school discipline and good behavior. In such cases the principal shall forthwith request the attendance of the parent or guardian of such suspended pupil at his office for the purpose of consultation and adjustment. If the pupil so suspended is not reinstated within three school days from the date of his original suspension, then the matter shall be referred in writing by head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within six school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.4 No student over sixteen years of age may be transferred to another school or suspended for more than ten school days for disciplinary reasons except in accordance with sections 215.1 or 215.2. No student under sixteen years of age may be transferred to another school or suspended for more than six school days for disciplinary reasons except in accordance with section 215.3.

Ch. III. Duties of the Superintendent

60.1 He may review all cases of suspension or discipline of pupils which are referred to him under section 215.

EXHIBIT B

PROPOSED RULES PERTAINING TO GRIEVANCES AGAINST TEACHERS

1. Statement of Purpose:

   These rules seek to provide a mechanism for the resolution of complaints filed against persons who are employed as teachers by the Boston School Committee. The purposes of these rules are to insure fair procedures for teachers who are complained against, to insure that a complaining person is able to present his claim knowing that it will be heard and determined speedily and impartially, and to involve teachers, parents, and administrators in matters which vitally concern the educational process in Boston.

2. Definitions:

   A. Major grievance: A complaint which, if proved, would constitute a violation of the Rules of the Boston School Committee or grounds for the suspension of dismissal of a teacher under Mass. Gen. Laws Ch. 71 SS42, 42D.

   B. Minor grievance: Any complaint against a teacher in the Boston School System which does not constitute a major grievance.

   C. Complainant: The parent or guardian of any person who is a student in the Boston School System.

   D. Grievance Board: A board, composed for each school within the Boston School System, consisting of the following members:

      a. The District Superintendent who is responsible for the district in which the school is located. The District Superintent shall act as chairman of the Board;

      b. One teacher selected annually by the teachers of each school within the Boston School System;

      c. One parent selected annually by the Home and School Association or other organization which generally represents parents of students within the school.

3. A complainant may present a major or minor grievance to the headmaster or principal of the school to which the teacher is assigned. The grievance may be presented orally or in writing, but in any case it shall be presented within ten days of the date when the grievance occurred. For good cause the principal or headmaster may accept a grievance presented within a reasonable time after the ten day period has expired. If the grievance is presented orally, the principal or headmaster shall immediately reduce the grievance to writing and shall confirm that the grievance is properly stated by obtaining the signature of the complainant. A copy of the written grievance shall then be delivered to the complainant.

4. Within two school days after the grievance is reduced to writing the headmaster or principal shall deliver a copy of the grievance to the teacher who has been complained against. The headmaster or principal shall not disclose the contents of the grievance to any person outside the school administration without the consent of the teacher.

5. Within three school days after delivery of a copy of the grievance to the teacher, the principal or headmaster shall meet with the complainant and the teacher and attempt to adjust the grievance. The teacher and the complainant shall have the right to appear at the meeting with counsel and shall have the right to call and examine any witness who appears at the meeting.

6. If the grievance is not adjusted to the satisfaction of any party to the proceeding, the matter shall be referred by the principal or headmaster to the Assistant Superintendent for the District within two school days after the meeting.

7. If the matter involves a major grievance, the Assistant Superintendent shall immediately notify the other two members of the grievance board for the school involved and shall schedule a hearing within ten school days after the matter was referred to him.

8. The hearing before the grievance board shall be conducted as follows:

   A. Reasonable notice of the hearing shall be sent to all parties by the Assistant Superintendent and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the facts and issues involved to afford them reasonable opportunity to present evidence and argument.

   B. All parties shall have the right to call and examine witnesses, to introduce exhibits, to question witnesses who testify and to submit rebuttal evidence.

   C. The grievance board is not required to observe the rules of evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

   D. All parties to the proceeding shall have the right to be represented by counsel.

   E. Any party shall, of his own expense, have the right to record or have transcribed the proceeding before the grievance board.

   F. The hearing shall be closed to the public unless the teacher who is complained against elects to make it a public hearing.

   G. The decision of the grievance board shall be rendered within five school days after the termination of the hearing, shall be based soley upon the evidence presented at the hearing, shall be in writing, and shall include a statement of the facts and a recommendation for disposition. Any member of the grievance board may write his own decision either concurring or dissenting from the decision of the majority.

9. If the grievance board recommends that the teacher be suspended, transferred, or dismissed from the System, the matter shall be referred to the Superintendent of Schools who shall take such action as he deems appropriate after giving due weight and consideration to the decision of the grievance board.

10. Any party to the proceeding before the grievance board may within five school days after receipt of notice of the decision, request the Superintendent of Schools to review the decision of the board and the Superintendent may, if he so elects, grant a hearing.

11. Any party to the proceeding may request the School Committee to review the decision of the Superintendent and the school committee may hold a hearing if it so elects.

12. If the grievance board recommends disciplining a teacher in such a way that does not involve suspension, transfer, or dismissal, the Assistant Superintendent shall, unless the recommendation is reversed by the Superintendent or School Committee, carry out the recommendation within a reasonable period of time.

13. If the matter involves a minor grievance, the Assistant Superintendent shall meet with all parties within five school days after the matter was referred to him. All parties shall have the right to appear at the meeting with counsel and shall have the right to call and examine any witness who appears at the meeting. The Assistant Superintendent shall use his good offices to adjust the alleged grievance to the satisfaction of all parties.

DON B. KATES, JR.
BRIAN PADDOCK
DIANE V. DELEVETT
PETER D. COPPELMAN
Attorneys at Law
22 Martin Street
Gilroy, California 95020
Telephone: (408) 842-8271

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FERNANDO HERNANDEZ, et al., Plaintiffs, vs. O.E. NICHOLS, et al., Defendants.	NO. C-70-800-RFD MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

PRELIMINARY STATEMENT

Plaintiff FERNANDO HERNANDEZ is a thirteen year old grammar school student standing five feet 1-1/2 inches and weighing 103 pounds. Defendant O.E. NICHOLS, the principal of Pacheco Elementary School in which FERNANDO is a student, is a man of mature years standing 5' 11" and weighing 180 pounds. On April 2, 1970 defendant NICHOLS, apparently in the course of punishing FERNANDO, beat him about the head and face with his fists kicked him in the rear and violently threw him to the ground where he was again kicked. FERNANDO was never informed of the infraction of which he was accused, much less given the opportunity to refute the accusation. This incident is but the latest, and not the most serious, of a series of beatings which defendant NICHOLS has inflicted upon grammar school students. Such incidents include at least two occasions on which children were knocked unconscious. Although these assaults were illegal under California law, and under their own regulations, defendant members of the Board of Education have refused all pleas that NICHOLS be disciplined or directed to discontinue such illegal acts.

In addition to damages, plaintiffs seek temporary and permanent injunctive relief forbidding the following:

(1) Kicking of children or beating them about the head or face or any other part of the body except the buttocks, or any beating which is of excessive severity or which violates defendant's own regulations on the subject;

(2) The infliction of any beating without prior notification to the child and the parents of the reasons therefor and an opportunity to refute the evidence against him and to confront his accusers;

(3) The infliction of any beating casually or in the heat of anger, or without the concurrence of two adults other than the school employee who accuses the child;

(4) The infliction of any beating by the school employee who accuses the child:

(5) Failure to provide an explicit and exclusive list of infractions for which beatings will be inflicted along with a schedule of maximum punishments.

ARGUMENT

I. BEATINGS LIKE THOSE INFLICTED UNPON FERNANDO ARE REMEDIABLE UNDER THE FEDERAL CIVIL RIGHTS ACTS.

Whether under the rubric of cruel and unusual punishment, invasion of a right to personal security or general due process, it is clear that unjustifiable physical assault of citizens by public officials is unconstitutional and is remediable under the Civil Rights Acts. York v. Story, 324 F.2d 450, 456, n. 12 (9 Circ. 1964), Allison v. California Adult Authority, 419 F.2d 822, 823 (9 Cir. 1969), Jackson v. Bishop, 404 F.2d 571 (8 Cir. 1969) and cases there cited. It is equally clear that administrative officials who countenance such activity by knowingly refusing to take steps to protect the victims thereof are subject at least to injunctive relief. See e.g. Schnell v. City of Chicago, 407 F.2d 1084 (7 Cir. 1969) ("Under section 1983, equitable relief is appropriate in a situation where governmental officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct."), Lankford v. Gelston, 364 F.2d 197 (4 Cir. 1966), Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1970). See also Fernelius v. Pierre, 22 Cal. 2d 226, 138 P.2d 12 (1943).

In addition to its specific guarantees, the due process clause of the Fourteenth Amendment generally forbids public officials to act in a manner which "shcoks the conscience." Rochin v. State of California, 342 U.S. 165, 169-170 (1953). Surely the conscience is shocked by the beating of a child in the manner described in plaintiffs verified complaint, particularly when it is done in the heat of anger, without notice of the accusations against him or opportunity for the child to refute them. (Nor is the shock value of the situation reduced by the fact that defendants have never denominated the offenses for which corporal punishment will be imposed or set out a schedule of maximmm punishments.)

In discussing this matter, it is worthy of note that corporal punishment in state prisons is outlawed per se by every state except Mississippi and Arkansas and has recently been judicially invalidated as a cruel and unusual punishment in the latter. Jackson v. Bishop, 404 F.2d 571 (8 Cir. 1969). It is incongruous, to say the least, that grammar school children should be subjected to treatment considered too harsh, or susceptible to administrative abuse for hardened criminals. Plaintiffs do not in this action challenge the constitutionality of corporal punishment for grammar school students per se. 1] Of course it might meaningfully be suggested that corporal punishment of children is expected to be so much less severe than that applied to prisoners as to be qualitatively different. Many parents employ moderate corporal punishment even without procedural amenities and are not considered to have violated societal norms thereby. But the position of a parent, whose chastisement of the child will predictably be restrained by love, is very different from a school official, particularly one of the character of defendant NICHOLS. After all, even a parent would not be privileged to kick, and beat about the head, a child of grammar school age.

II. DEFENDANT NICHOL'S CONDUCT WAS ILLEGAL UNDER CALIFORNIA LAW AND UNDER THE REGULATIONS PROMULGATED BY THE NORTH COUNTY DISTRICT.

California Education Code S10854 authorizes teachers to impose corporal punishment in accordance with regulations promulgated by their local school boards. The regulations of the School District, though meagre, do require that all blows be formally administered with a paddle to the child's posterior. They further require the presence of at least one adult witness. (Exhibit D).

The authorization of Education Code S10854 is limited by the provisions of Penal Code S273a (prohibiting infliction of "unjustifiable physical pain" upon a child) as authoritatively construed in People v. Curtiss, 116 Cal.App. Supp. 771, 300 Pac. 801 (1931). The court therein upheld the conviction of a grammar school principal under S273a on the alternative grounds of unjustificably paddling a child and/or using excessive force in such paddling.

1] This is not, however, to be construed as an admission by plaintiffs or their counsel of the constitutionality of the practice. Rather, it is plaintiff's personal view, as layman, that the schools ought to have power to inflict moderate corporal punishment under adequate safeguards against injury and standards of procedural fairness. The scope of this lawsuit is thus circumscribed by plaintiffs' desire for limited relief, rather than by the perameters of constitutional protection.

The court first considered and rejected a line of older cases holding that a teacher has absolute discretion as to whether or not a pupil should be punished and as to the extent of the punishment. On the contrary, Penal Code S273a authorizes the trier of fact to determine whether the punishment was "unjustifiable," i.e. whether: (a) any punishment at all was justified; (b) corporal punishment was justified; (c) if corporal punishment was justified, the amount inflicted was nevertheless excessive:

> "And even if it be conceded that there is no direct testimony that punishment (irrespective of degree) was unmerited, under the circumstances, we take it that the trial judge [who sat as finder of fact] was not bound to accept the opinion of the appellant [defendant] to the effect that it was merited. He could determine the question from a consideration of the circumstances under which the punishment was inflicted, and reach the conclusion--as stated by him at the close of the case--that its infliction for the alleged injury to another boy was without cause, because the defendant made no attempt 'to gain any facts in relation to the matter; she preferred to rely upon the unsupported statement made by the mother [of the other child] who was, no doubt, more or less agitated by reason of the alleged injury inflicted upon her boy.'" (300 Pac at 807).

As to the issue of excessiveness, the trial court could properly rely upon evidence of bruises on the child's body and the testimony of the child and his brother, even though that testimony was contradicted by that of teachers who served under the defendant's direct supervision and control. 300 Pac at 805-806.

The Curtiss case appears to be the only construction of Penal Code S273a with regard to corporal punishment inflicted by a teacher upon a student, or in relation to Educ. C. S10854.

In subsequentally reenacting S273a in identical form (except to add imprisonment to the previous provision for a fine in case of violation), the California legislature must be deemed to have accepted the construction placed upon the statute by Curtiss. See In Be Halcomb, 21 Cal.2d 126, 130 P2d. 384, 386 (1942) ("the Legislature is presumed to have known of these decisions and to have had them in mind when it enacted [a new statute] in practically the exact language of [its predecessor].")

The Curtiss decision (rendered on facts not materially different from those involved in the present case) is relevant in two respects. First, it is dispositive that defendants' conduct is unlawful as a matter of state law and therefore subject to injunction within the ancillary jurisdiction of this court. 2] But Curtiss, and Penal Code S273a, are also of vital importance to plaintiffs' federal civil rights claims. In general, states are free to impose punishments or delegate the imposition of punishments, as they see fit so long as: (a) procedural fairness obtains, (b) punishments are not cruel and unusual; (c) the punitive scheme is rationally related to some legitimate state purpose. The operation of the schools is a matter entrusted to state and local administrative officials, and one with shich the federal courts are loath to interfere. 3] But, in view of the illegality of defendant's acts under state law, the foregoing principles are inapplicable to this situation--or, apply with reverse English. It is not this court, but rather defendants, who are interfering with the lawful administration of the schools. Plaintiffs ask no more than that this Court enforce the dictates of state law against public officials who have flouted them.

Nor can it be suggested that defendants' conduct is anything other than constitutionally arbitrarary, irrational and unreasonable for it is patent that violation of state law cannot be justified as rationally related to any legitimate state objective. Finally, where state legislation parallels basic requirements of federal constitutional guarantees, violation of such state requirements is ipso facto constitutionally prohibited. Valle v. Stengel, 176 F.2d. 697 (3 Cir. 1947).

III. TO AVOID VIOLATION OF DUE PROCESS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS, CORPORAL PUNISHMENT MUST BE ATTENDED BY CERTAIN BASIC MINIMAL PROCEDURAL SAFEGUARDS.

Plaintiffs are not familiar with any federal civil rights case, or indeed any case, which has considered the constitutionality of corporal punishment of school children. Two recent district court opinions do consider the requisites of corporal punishment of state prisoners for infractions of prison rules. 4] Talley v. Stephens, 247 F.Supp 683 (E.D. Ark. 1965), Jackson v. Bishop, 268 F.Supp. 804 (E.D. Ark. 1967), rev'd. on other grounds 404 F.2d. 571.

The prison regulations and practices as they existed at the time of the Talley case bore a remarkable resemblance to those employed by defendants in the present case. As the court said at pp. 687-688 of 247 F. Supp:

> "...the [State Penitentiary] board adopted a brief resolution authorizing the corporal punishment whenever in the judgment of the prison superintendent it apperas that such punishment is necessary to maintain prison discipline or to enforce respect for Penitentiary policies. The resolution did not prescribe

---

2] See discussion infra. at p. 10.

3] On the other hand, the federal courts are imperatively required to intervene when school administration imperils the exercise of federal rights. "However wide the discretion of School Boards, it cannot be exercised so as to arbitarily deprive persons of their constitutional rights." Johnson v. Branch, 364 F.2d 177, 180 (4 Cir. 1966). See also Jackson v. Bishop, 404 F.2d 571, 577 (8 Cir. 1968).

4] As previously indicated, on appeal from the second of these district court decisions the Eighth Circuit declared corporal punishment unconstitutional per se, The lower court decisions assumed the constitutionality of corporal punishment, but imposed certain minimum requirements of procedural fairness and standards of physical safety. Of course the imposition of complete bar to corporal punishment in one area cannot justify ignoring any constitutional safeguards at all in another.

the form of such punishment, or the extent to which it may be employed. Its administration in practice has been described.

> "There are no written rules or regulations prescribing what conduct or misconduct will bring on a whipping or prescribing how many blows will be inflicted for a given act of misconduct. The punishment is administered summarily, and whether an inmate is to be whipped and how much he is to be whipped are matters resting within the sole discretion of the prison employee administering the punishment, subject to the present informal requirement of respondent that the blows administered for a single offense shall not exceed ten."

In enjoining further corporal punishment until and unless new, more explicit regulations were issued by the Penitentiary Board, the Court outlined basic procedural safeguards identical to those which plaintiffs deem appropriate here:

> "But, the Court's unwillingness to say that the Constitution forbids the imposition of any and all corporal punishment on convicts presupposes that its infliction is surrounded by appropriate safeguards. It must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce ... It is not the function of the Court to undertake to prescribe appropriate safeguards; that is the function of the Board or of respondent subject to the Board's approval. For the guidance of those in charge of the Penitentiary the Court will say, in a general way, that it has particular trouble with the fact that there is no established schedule of punishments, that punishments are inflicted

> summarily and by Assistant Wardens who may or may not be men of judgment and temperate nature, and that Talley as an individual has been subjected to physical beatings at the hands of Pike. The Court is also troubled by the fact that the question of whether a convict has produced "sufficient work" during a particular period *is left to the subjective judgment of the Assistant Warden*, who may, at times, act uncritically upon the recommendation or report of the line rider [prisoner supervising work]." (247 F. Supp. at 689-90; emphasis added)

When the case again came before the district court two years later, the judges found it necessary to clarify and adumbrate the standards developed in the previous opinion. As was said at 268F. Supp. 815-816:

> "First, more than one person's judgment should be required for a decision to administer corporal punishment. This is implicit in the existing rules which require such a decision to be made by a board of inquiry. In this procedure, the accuser should not be counted among those who sit in judgment.
>
> "Secondly, that circumvention of the rules and regulations by an official in time of anger is intolerable. Certainly a prisoner charged with a rule violation is entitled to and should be provided with an objectively reasoned, dispassionate decision as to whether or not he should be punished.
>
> "Third, that summary acceptance of one inmate's report on another without further investigation in determining whether punishment should be administered voids the effectiveness of any rules and regulations.
>
> "And, finally, it is suggested that the Superintendent or an Assistant Superintendent of the Prison participate in or review any decision to

inflict corporal punishment."

IV. PLAINTIFFS ARE ENTITLED TO RELIEF ON THEIR STATE LAW CLAIMS.

People v. Curtiss, supra. is dispositive of the rectitude of plaintiffs substantive claims. Conduct like that engaged in by defendant NICHOLS gives rise to a claim for civil assault. Serres v. South Santa Anna School District, 10 C.A.2d 152, 51 P.2d 893 (1935).

Furthermore, Pen. C S273a, as a criminal statute, establishes the public policy of the State, and, as such, is enforceable by equitable decree. Petermann v. International Brotherhood of Teamsters, 174 C.A.2d 184, 344 P.2d 25 (1959), Glenn v. Clearman's Golden Cock, Inc. 192 C.A2d 793, 13 CRptr. 793 (1961), Williams v. International Brotherhood of Machinists 27 C.2d 586, 165 P.2d 903, 905 (1946) ("...where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy, the courts have full power to afford the necessary protection."). See also Sapiro v. Frisbie, 93 Cal.App.299, 270 Pac. 280 (1928).

DATED: April 16, 1970

Respecfully submitted,

By________________________________
DON B. KATES, JR.
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FERNANDO HERNANDEZ, MAXINE HERNANDEZ, LUPE HERNANDEZ, ROSEMARY HERNANDEZ, YOLANDA HERNANDEZ, AUGUSTINE HERNANDEZ and DANIEL HERNANDEZ, through their parents and general guardians MAX and GUADALUPE HERNANDEZ; GENARD GUTIERREZ, ORALIA GUTIERREZ and ALVIA GUTIERREZ, through their parents and general guardians JOSE C. and SEVERA GUTIERREZ; RONNIE ACOSTA, CONRADO ACOSTA, ARMANDO ACOSTA, JOE LOUIS ACOSTA and MIKE ACOSTA, JR. through their parents and general guardians, MIKE and ADELIA ACOSTA; all for themselves individually and for all other parents and children similarly situatuated.

Plaintiffs

vs.

ORVILLE E. NICHOLS, indivdually and as Superintendent of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT; THE NORTH COUNTY JOINT UNION SCHOOL DISTRICT, a public entity, JOE CONCONI, WILLIAM HAWKINS, FRED SHARP, LILLY SHIMONISHI, and RUSSELL SMITH, all individually and as members of the Board of Trustee of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT; and PAUL RUETER, individually and as an employee of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT,

Defendants.

NO. C-70-800-RFP

ORDER TO SHOW CAUSE RE TEMPORARY RESTRAINING ORDER AND TEMPORARY RESTRAINING ORDER

On reading the verified complaint of plaintiffs on file in this action, the affidavits attached thereto and memorandum of points and authorities submitted therewith, and it appearing to the satisfaction of the Court that this is a proper case for granting an Order to Show Cause and a Temporary Restraining Order. A Temporary Restraining Order as set forth below having been agreed to:

NOW THEREFORE it is hereby ordered that the above-named defendants and each of them appear before this Court at 190 Market Street, San Jose, California on April 24th, 1970 at the hour of 10:30 a.m. then and there to show cause, if any they have, why they and each of them and their agents, employees, alternates successors or anyone connected therewith should not be enjoined and restrained during the pendency of this action from imposing corporal punishment on child plaintiffs or any child similarly situated: (a) because of his racial or ethnic background; (b) in a cruel or excessive manner or disproportionately to the offense; (c) by blows with the hands or fists or feet to any portion of a child's anatomy except his posterior, such blows to be delivered only by hand or paddle and not to exceed five in number; (d) in the heat of anger or informally or casually; (e) by the person who brings the charge against the child; (f) without the prior concurrence of at least two adult school employees other than the person who brings the charges against the child; (g) in any manner not specified in the School District regulations on this subject: (h) except as provided in a list of offenses for which corporal punishment will be imposed which shall also specify the maximum amounts of such punishments; (i) without prior written notice to the parent and and child of the charges and possible punishments and the opportunity for the same to be heard and for the child to confront his accusers.

IT IS FURTHER ORDERED that pending the hearing and termination of said Order to Show Cause the defandants and each of them and their agents employees, alternates and successors, and anyone connected therewith, shall be, and they are hereby, restrained and enjoined from imposing corporal punishment on the named child plaintiffs Provided nothing herein shall prevent the defendants from taking other appropriate disciplinary action.

DATED: April 16, 1970, at 10:52 a.m.

/s/ ROBERT F. PECKHAM
UNITED STATES DISTRICT JUDGE.

I. Corporal Punishment of Students in Public Schools violates the Eighth Amendment which protects citizens against cruel and unusual Punishment.

The Eighth Amendment applies to the states and its agencies through the Fourteenth Amendment. Powell v. Texas,392 U.S. 514 (1968). The United States Supreme Court has declared that the Eighth Amendment must draw its meaning from "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (opinion of Warren, C.J., joined by Justices Black, Douglas, and Whittaker.) It exists to "vindicate broad and idealistic concepts of dignity, civilized standards, humanity and decency and while its scope may be unclear, its basis is the dignity of man." [Jackson v. Bishop, 404 F. 2d 571 (8 Cir. 1968); see note, "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law," 79 Harv. L. Rev. 635, 637 (1966), Note, "The Eighth Amendment and our Evolving Standards of Decency - A Time for Re-Evaluation," 3 Suffolk L. Rev. 616 (1969).] Standards of decency change with the times and modes of punishment accepted in Blackstone's era are no longer acceptable. Thus, "in former times, being put in the stocks was not considered as necessarily infamous...

N.B. This draft could not have been prepared without the availability of materials prepared or gathered by Gershon M. Ratner of the Boston Legal Assistance Project.

But at the present day, it might be thought an infamous punishment." [Ex parte Wilson, 114 U.S. 417, 428.]

The Eighth Amendment has been applied when the very fact of punishment, even though a short sentence, is uncivilized. Thus the crime of being addicted to the use of narcotics was abolished by the Supreme Court. [Robinson v. California 370 U.S. 660 (1962).]

The issue is whether corporal punishment of a student by a teacher offends current standards of decency and the dignity of the student. To resolve that, an examination of the use of corporal punishment in other contexts and an examination of the particular context of education will be made.

In past times physical beatings were sanctioned in a variety of relationships. Sailors were commonly flogged by the master of a ship; today it is a crime on a United States vessel. [18 U.S.C. s. 2191.] A husband could beat his wife to control her; now that would constitute an assault. [Puckett v. Puckett, 240 Ala. 607.] Servants and slaves were physically punished by their masters; the status of employee or servant no longer justifies such measures. [Tinkle v. Dunivant, 16 Lea 503 (1866, Tenn).] By the first Crime Act of the United States whipping was part of the punishment for stealing or falsifying records or receiving stolen goods. [Act of April 30, 1790 Ch. 9,1 Stat. 112-117.] The punishments of whipping and of standing in the pillory were abolished by the act of February 28, 1839. [Ch. 36 s. 5, 5 Stat. 322.] Nor do parents enjoy the same liberty over their children as existed in Rome, where,

> "...the father shall during his whole life, have absolute power over his legitimate children. He may imprison the son or scourge him or keep him working in the fields in

fetters or put him to death..."
Stephenson History of Roman Law, at 128 (1912)

All states but two have outlawed corporal punishment for prisoners retained in state prisons and in Alabama where the legislature had not prohibited corporal punsihment, the federal court held that it was a violation of the prisoner's human dignity contravening the Eighth Amendment. [Jackson v. Bishop, op. cit.] It would be shocking if children were considered to have less human dignity than adults serving time for violating a criminal rule of the society.

The common law allowed school masters "in loco parentis" authority to corporally punish students. However that practice has been condemned by educators, philosophers, sociologists and psychologists regardless of the position of the prevalent educational theory of the time. In 1529 Erasmus noting that children could not be treated as adults, queried "But how often does the school master of today prove by his harsh discipline that he wholly forgets this simple truth?" [Erasmus in Paul Nash, Models of Man p. 185.] Roger Ascham, Montaigne and Vittorino da Feltre all advocated humane treatment of children contrary to prevailing practice in the Middle Ages.

Corporal punishment has not gone unchallenged in the United States. In 1853, Judge Smart of the Supreme Court of Indiana stated:

> The public seem to cling to the despotism in the government of schools which has been discarded everywhere else...The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy...should be less sacred in the eye of the law than

> that of the apprentice or the sailor, is not easily explained. Nash, "Corporal Punishment in an Age of Violence," in Educational Theory, Vol. 13, October 1963, p. 296, quoting Cooper v. McJunkin, Supreme Court of Indiana (1853).

Corporal punishment of students has been likened to the "method of the prison, torture, police and standing army." [Parker, "Democracy and Education" (July 1891), in Rippa, ed., Educational Ideas in America, p. 240.] A New York principal, in a statement appended to the Reports on the Committee on Education concerning Corporal Punishment in 1868 stated that corporal punishment "is a relic of medieval barbarism when study was a penance and a student an ascetic." [Hunter, Thomas, statement appended to the Reports on the Committee of Education Concerning Corporal Punishment in the Schools of the Commonwealth, 1868, p. 21.]

A proponent of corporal punishment might contend that corporal punishment can be administered moderately, with the temperance of a parent. However, a teacher lacks the parental love for every child within his charge; and the temperment of the teacher is a variable factor.

> ...if it could so be that we had all teachers of excellent tempers and of calm and deliberate judgment, the rod might be with better reason used. But this we can never expect. Ibid. Shippen p. 18.

Moderation was rejected as sufficient justification for physical punishment of prisoners, sailors, servants and wives. In a recent critique of education in America, Jonathan Kozol noted the "really unmistakable kind of satisfaction" teachers manifested while rattanning students.

> Would any teacher be able to say with absolute certainty that he has not sometimes taken pleasure in that slash of the rattan and that he has not felt at times an almost

> masculine fortification out of the solemnity and quietude and even authoritative control and decency with which he struck the child? Kozol, Death at an Early Age, p. 16-17.

As stated more boldly by Paul Nash, "teachers with sadistic-masochistic tendencies are attracted to schools which rely heavily on corporal punishment for discipline." Paul Nash, "Corporal Punishment in an Age of Violence," p. 300.

In 1956, the National Education Association after a thorough study concluded that corporal punishment had no effect on reducing behavior problems. [NEA Research Bulletin XXXIV, No. 2 April 1956.] In 1961 an English study concluded:

> It is notable that the schools where corporal punishment was absent had the best records of behavior and delinquency, despite being in areas with the lowest average ratable value. It is also notable that behavior deteriorates and delinquency increases as corporal punishment increases. Nash, Corporal Punishment, p. 301.

Certain psychologists have suggested that to be effective physical punishment must be recurrent and sustained. [Estes and Skinner, quoted in Nash, Corporal Punishment, p. 302.] Research results showed that "extremely severe punishment may eliminate behavior permanently, but in order to do so the punishment must be positively terrifying and traumatic." [Symonds quoted in Nash, op. cit. p. 302.] The inescapable conclusion is that corporal punishment cannot be effective without being brutal.

Other undesirable consequences may occur. Corporal punishment may induce fear which is not conducive to learning.

> Disciplining by parents or teachers that creates constant fears and anxiety will inhibit children by stifling their natural tendencies to explore and to experiment. Silverman, Discipline in Mental Hygiene, 1958, 42, p. 277.

Or it may induce withdrawal by the child, or the child may channel his fear to aggressive behavior, an extreme consequence of which is juvenile delinquency. Kvaraceus has concluded that much delinquency is a "reaction against the punishments and frustrations of the school." [Kvaraceus in Nash op. cit. p. 306.] And worst, it may prevent the student from developing his sense of self regulation. The good of the student can only be promoted by

> ...helping him understand and master himself. Corporal punishment hinders this process by taking from him the incentive for serious self-criticism and hence by denying him the opportunity for exercising self-direction. Nash, op. cit. p. 304. See Goodman, Compulsory Miseducation and the Community of Scholars.

A noted contemporary American commentator on childhood and society, Eric H. Erikson, notes that, "The male adult, so easily given to moral vindictiveness, should learn to educate without violence, that is, with a recognition of the inviolacy of the counterplayer even if, and especially when, that counterplayer is a child." [Eric H. Erikson, Ghandi's Truth, p. 248.] Violence breeds violence.

There are readily available alternative modes of discipline which lack the insulting and debilitative qualities attendent to corporal punishment. Harold W. Bernard lists the considerations which aid in discipline: teachers must understand the nature of children...that the mental growth of a child is uneven and unpredictable and that there are no specific patterns into which all children fall; strict domination should be avoided since gestapo-like techniques for maintaining order fail to encourage continuous and productive activity in the classroom; a good adult example should be set; the teacher must have confidence in himself and the students.

The teacher should provide substitute behavior - instead of telling a child to study the teacher should determine why the child is disruptive or disinterested. The problem may be with the curriculum. Interest and discipline are "correlative aspects of activity having an aim. Interest means that one is identified with the objects which define the activity and which furnish the means...of its realization." [Dewey, *Democracy and Education*, p. 161.]

The teacher must provide clear guidelines so that students can discriminate between acceptable and non-acceptable behavior." [Mayer, Sulzer, Docy, "The Use of Punishment in Modifying Student Behavior" in *Journal of Special Education*, p. 325, and Reissman, Frank, "The Culture of Poverty: Educating the Children of the Poor", 1967 in *Rippa*, p. 571.] When transgression occurs, discipline which follows should be appropriate and consistent, taking "into account the individual, the time, the total situation and the degree to which behavior differs from the individual's typical responses." [Bernard in Silverman, p. 281.] It should not exceed in degree the seriousness of the offense. There is no official definition of the offenses which would justify corporal punishment. However, the typical offense in the school is talking, fighting with another student, disobeying a teacher's order, and running in the halls. Physical beatings for such infractions are wholly disproportionate and constitutionally excessive. Discussion, judgment, suspension of privileges and detention are readily available and do not contain the same menace of excessiveness implicit in corporal punishment.